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MICHIGAN REPORTS.

REPORT OF CASES

DETERMINED IN THE

SUPREME COURT OF MICHIGAN

FROM

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SUPREME COURT OF MICHIGAN.

THOMAS M. COOLEY, Chief Justice.

JAMES V. CAMPBELL,

ISAAC MARSTON,

BENJAMIN F. GRAVES,

} Associate Justices.

ANDREW J. SMITH, Attorney General.

CIRCUIT JUDGES.

FIRST CIRCUIT,
DANIEL L. PRATT.

SECOND CIRCUIT,
HENRY H. COOLIDGE.

THIRD CIRCUIT,
CORNELIUS J. REILLY.

FOURTH CIRCUIT,
GEORGE M. HUNTINGTON.

FIFTH CIRCUIT,
PHILIP T. VAN ZILE.

SIXTH CIRCUIT,
AUGUSTUS C. BALDWIN.

SEVENTH CIRCUIT,
JOSIAH TURNER.

EIGHTH CIRCUIT,
LOUIS S. LOVELL.

NINTH CIRCUIT,
JOSIAH L. HAWES.

TENTH CIRCUIT,
WILLIAM S. TENNANT.

ELEVENTH CIRCUIT,
DANIEL GOODWIN.

TWELFTH CIRCUIT,
WILLIAM D. WILLIAMS.

THIRTEENTH CIRCUIT,
REUBEN HATCH, JR.

FOURTEENTH CIRCUIT,
AUGUSTINE H. GIDDINGS.

FIFTEENTH CIRCUIT,
EDWIN W. KEIGHTLEY.

SIXTEENTH CIRCUIT,
EDWARD W. HARRIS.

SEVENTEENTH CIRCUIT,
BIRNEY HOYT.

EIGHTEENTH CIRCUIT,
SANFORD M. GREEN.

NINETEENTH CIRCUIT,
HARRISON H. WHEELER.

TWENTIETH CIRCUIT,
DAN J. ARNOLD.

TWENTY-FIRST CIRCUIT,
HENRY HART.

JUDGE OF THE SUPERIOR COURT OF DETROIT,
LYMAN COCHRANE.

JUDGE OF THE SUPERIOR COURT OF GRAND RAPIDS,
JOHN T. HOLMES.

RECORDER OF THE CITY OF DETROIT,
GEORGE S. SWIFT.

TABLE OF CASES

REPORTED IN THIS VOLUME.

	PAGE
ADAMS, WINFIELD v.	437
ALBRIGHT v. COBB. <i>Vacant lands: Constructive possession: Mortgagor.—Mortgagee: Right of possession: Right of entry: Statute of limitations.</i>	316
ALLEY, GRAND RAPIDS, NEWAYGO & LAKE SHORE R. R Co: v. 16, 18	
AMERICAN INSURANCE CO. v. WOODRUFF. <i>Premium note: Insurance policy: Surrender: Notice: Delivery to a stranger.—Suit by a foreign corporation: Record: Presumptions: Plaintiff's course of proof.—Evidence: Authority to contract.—Practice.—Bills of exceptions: Misstatements.</i>	6
ANDERSON v. RUSSELL. <i>Estates of deceased persons: Claims: Administrator: Evidence.—Corroboration.</i>	109
ANDERSON v. WALTER. <i>Promissory notes: Rule 79: Denying execution: Affidavit.—Fraud: Evidence: Cross-examination.—Charge to the jury: Construction: Repetitions.—Promissory notes: Negligence in executing and putting in circulation: Good faith.—Contracts: Negligence in executing: Comparison.</i>	113
ASHLEY, STEWART v.	183
ATTORNEY GENERAL v. EVART BOOMING CO. <i>Equity jurisprudence: Information: Public grievance.—Purprestures: Nuisances.—Navigable streams: Soil under the stream: Riparian owner.—Highways: Floatage.—Bed of streams: Private appropriation.—Booming companies: Reasonable appropriation.—Competing booming companies: Inconvenience: Public nuisance.—Common use of a common right: Reasonable use: Incidental inconvenience.—Reckless or careless exercise of general public right: Private injury: State interest.—Equity pleading and practice: Information: Bill: Complainant: Relator.</i>	462
ATTORNEY GENERAL v. SUPERVISORS OF BAY COUNTY. <i>Taxes: Loans: Public uses: Application: Supervision.—Highways: Supervisors: Expenditures: Discretion.—Township purposes.</i>	46

	PAGE.
ATTORNEY GENERAL <i>v.</i> SUPERVISORS OF BENZIE COUNTY. <i>Removal of county seat: Canvass of votes: Final action: Reconsideration.</i>	211
AUDITOR GENERAL <i>v.</i> PULLMAN PALACE CAR CO. <i>Proceedings on appeal from an assessment of taxes: Review: Writ of error.</i>	59
AVERY <i>v.</i> RYERSON. <i>Bill to redeem: Assignee in bankruptcy: Permission of bankruptcy court.—Foreclosure: Assignee in bankruptcy of subsequent mortgagee: Estoppel.—Subsequent mortgage: Right of redemption: Parties.—Death: Abatement.—Decree: Sale: Purchaser.—Averments.</i>	362
BAILEY, BURROWS <i>v.</i>	64
BANGS, BURROWS <i>v.</i>	304
BARBER <i>v.</i> SAGINAW CITY. <i>Charter of Saginaw City: Director of the poor: Employment of physician: Surgical operation.</i>	52
BARRON, ROBBINS <i>v.</i>	517
BATTERSHALL <i>v.</i> STEPHENS. <i>Written evidence: Construction: Question for the court.—Registry law: Purchaser in good faith: Documentary evidence: Charge to the jury.—Priority of record: Moral integrity.—Deeds: Prior unrecorded deed: Conveyances: Priority of record.</i>	68
BECKMAN, DETROIT <i>v.</i>	125
BELITZ, GREEN <i>v.</i>	512
BLACKWOOD <i>v.</i> BROWN. <i>Declaration: Moneys wrongfully detained: Common counts.—Collateral securities: Bond to third person: Performance satisfactory to obligee: Surety.—Contracts: Written instrument: Distinct parol agreement: Evidence.—Another suit pending: Bar.</i>	4
BOYCE <i>v.</i> STAMBAUGH. <i>Evidence: U. S. land patent: Transcript of record: Certificate.—Deeds: Ejectment.</i>	348
BRABON <i>v.</i> PIERCE. <i>Replevin bond in justice's court: Appeal: Costs.—Appeal bond: Cumulative remedy.</i>	39
BRISTOL <i>v.</i> JOHNSON. <i>Equity pleading and practice: Parties: Tax payers: Injunction.—Taxation: Legislative power: Constitutional law.</i>	123
BROWN, BLACKWOOD <i>v.</i>	4
BROWN, HAESCIG <i>v.</i>	503
BROWN, PEOPLE <i>v.</i>	339
BROWN, SMITH <i>v.</i>	455
BUCK, GROVER <i>v.</i>	519
BURKE <i>v.</i> BURKE. <i>Statute of descents: Inherited estate of deceased minors: Statute construed.—Infants: Inherited estates: Rules of descent.—Construction of statute.</i>	451
BURNHAM, GRAND RAPIDS FURNITURE MANUFACTURING CO. <i>v.</i>	29
BURNHAM, GUSTIN <i>v.</i>	511
BURNHAM <i>v.</i> VAN GILDER. <i>Trespass to lands.—Rightful possession: Particular use.—Practice: Certiorari: Judgment: Technical imperfections.</i>	246

	PAGE.
BURROWS v. BAILEY. <i>Evidence: Letter of guardianship.—Certificate: Recitals: Presumptions: Regularity.—Replevin: Description of property: Variance: Certificate of appraisal.</i>	64
BURROWS v. BANGS. <i>Mortgages: Certificate of deposit: Payment: Risk of loss.—Evidence: Ownership: Bank accounts.—Refusing discharge of mortgage: Statutory penalty: Good faith.</i>	304
BURROWS, DETROIT SAVINGS BANK v.	153
BUSH v. DAVIS. <i>Arbitration: Award: Construction: Definiteness: Presumptions.—Amount: Time: Matter of computation.—Interest: Submission: Intendments.</i>	190
BUTTERFIELD, CARPENTER v.	97
CAMPBELL v. PEOPLE. <i>Criminal law: Rape: Assault with intent to ravish.—Evidence: Objections: Reasons.—Charge to the jury: Good reputation.</i>	351
CANFIELD v. CANFIELD. <i>Divorce: Bill: Adultery: Venereal disease: Extreme cruelty.</i>	519
CARPENTER v. BUTTERFIELD. <i>Goods sold and delivered: Evidence: Common counts.</i>	97
CARUTHERS, MCDIARMID v.	49
CHAMBERS v. HILL. <i>Title to personality: Administrator: Dealings between decedent and his son.—Evidence: Conversations: Substance: Exact words used.—Rulings that do not prejudice.—Matters equally within knowledge of decedent.—Rebuttal: Negative testimony.—Father and son: Promise to support: Transfer of personal property: Testamentary gifts.</i>	523
CHAPMAN v. DEASE. <i>Lumbering contract: Failure of performance: Both parties in default: Damages: Profits.—Plaintiff in default: Logs delivered and appropriated: Measure of recovery.—Limit of recovery: Contract price: Value.—Quantum valebat: Basis of recovery: Contract.—Measure of damages: Recoupment.—Logs: Sales: Advances: Damages.—Log contract: Percentage of uppers: Scales.</i>	375
CHEEVER v. CONGDON. <i>Evidence: Age: Witness.—Guardian and ward: Settlement by ward after majority.</i>	296
CLARK v. DASSO. <i>Highway commissioners: Trees: Removal: Trespass.—Highways: Shade trees: Obstructions.—Adjacent owner.—Removing trees: Justification.</i>	86
CLAY v. PENNOYER CREEK IMPROVEMENT CO. <i>Eminent domain: Improvement of navigable rivers: Appointment of commissioners: Final order: Certiorari.—Statute construed: Private streams.—Petition: Jurisdiction.—Dams: Consent of supervisors.—Legislation: Adopting by reference sections of another act: Construction.</i>	204
COBB, ALBRIGHT v.	316

	PAGE.
COLGROVE v. SOLOMON. <i>Statute of frauds: Contracts for purchase of land: Agency: Authority.—Money had and received: Oral agreement to accept payment in land: Rescission.—Part performance: Payment of money: Preparatory acts.—Deeds: Reservation of possession: Crops.</i>	494
COLLVER, LELAND v.	418
COMMON COUNCIL OF DETROIT, MICHIGAN PAVING CO. v. . .	201
CONGDON, CHEEVER v.	296
CREASEY v. ST. GEORGE'S SOCIETY OF DETROIT. <i>Equity pleading and practice: Demurrer overruled: Decree: Leave to answer.—Case made by bill.</i>	51
CRIPPEN v. HOPE. <i>Settlement: Performance: Delivery to third person mutually agreed upon: Wrongful acts of mutual agent.—Unauthorized acts of agent: Mutual responsibility.</i>	55
CURLEY v. WYMAN. <i>Practice: Requests to charge: Want of evidence: Record: Presumptions.—Evidence: Intoxicating liquors: Construction.</i>	353
CUTLER, POPE v.	150
DALE v. TURNER. <i>Swamp lands: Statutes construed: Purchaser from the United States: Intervening rights.—Legislation construed.—Swamp land acts: Donation to state: Sales by United States.—Bills to quiet title.—Estoppel in pais: Equity pleading: Answer.</i>	405
DANAHER v. HITCHCOCK. <i>Declaration: Promissory notes: Partnership name.—Venue.</i>	516
DASSO, CLARK v.	86
DAVIS, BUSH v.	190
DEASE, CHAPMAN v.	375
DEMASS, REUSCH v.	95
DETROIT v. BECKMAN. <i>Concessions on the trial: Admission of rule of law.—City improvements: Defects in the plan: Legislative action.—Public improvements: Appropriation of private property: Plan of the work.—Highways: Guarding against dangers: Discretion: Local legislative action: Political question.</i>	125
DETROIT, FORT WAYNE & ELMWOOD R. W. CO. v.	78
DETROIT, LANSING & LAKE MICH. R. R. CO., TOWER v. . .	328
DETROIT v. LAUGHNA. <i>Detroit House of Correction: Misconduct of officers: Liability of city.—Custodian: Prisoners: Officers: State agents.—Prisons: Public places of detention: Public laws.</i>	402
DETROIT v. MARTIN. <i>Assessments: Threatened sale: Cloud upon title: Payment under protest: Recovery.—Clouds upon title to lands: Void tax sale: Unconstitutional statute: Sale.—Void tax: Threat to enforce payment: Voluntary payment.—Protest.</i>	170
DETROIT SAVINGS BANK v. BURROWS. <i>Banks: Deposits:</i>	

	PAGE.
<i>Adverse claimant: Notice to depositor: Defense.—Bankers: Depositors: Claim by third person: Negligence.—Application for continuance: Evidence.—Motion for new trial: Burden of defense.—Collusion: Costs: Prompt payment.—Deposits: Payable to order of third person: Debtor and creditor.</i>	153
DETROIT SHARPSHOOTERS' ASSOCIATION v. HIGHWAY COMMISSIONERS OF HAMTRAMCK. <i>Condemning lands: Statute to be strictly followed.—Highways: Commissioners: Notice of meeting: Application: Jurisdiction.—Laying out highways: Notice: Proof of service.</i>	36
DUNCAN, MCARTHUR v.	27
DUNCAN v. SEELEY. <i>Evidence: Recollection refreshed by memorandum: Production of the writing.—Testifying from memorandum: Refusal to produce the writing: Subsequent offer to produce: Error not cured.—Cross-examination.</i>	369
DUNCOMBE, TOLLES v.	101
DUNN v. GILMAN. <i>Search warrant: Officer: Protection: Official acts.—Process: Penalty for not serving: Liability for serving.—Custody of law.</i>	256
EDWARDS v. TALIAFERO. <i>Stipulations: Evidence: Record: Practice.—Guardians: Mortgages: Probate proceedings: Statute construed.—Tax-titles: City tax-lease: Excessive assessment.</i>	13
ELKINS, WARD'S CENTRAL & PACIFIC LAKE CO. v.	439
EPPINGER, HOWRY v.	29
ETHIER, METROPOLITAN LIFE INS. CO. v.	277
EVART BOOMING CO., ATTORNEY GENERAL v.	462
FARMERS' LOAN AND TRUST CO. v. ST. CLAIR. <i>Replevin: Special interest: Verdict: Amount.</i>	518
FARWELL v. JOHNSTON. <i>Equity pleading: Allegation of consideration: General demurrer.—Consideration: Release by wife: Dower: Homestead.—Contracts: Statute of frauds: Performance.—Specific performance: Bona fide purchaser.—Bill of complaint: Prayer: Compensation.</i>	342
FINLEY SHOE & LEATHER CO. v. KURTZ. <i>Corporations: Increase of capital stock: Corporate officer.—Stockholders: Individual action.—Contracts: Mutuality: Corporate action.</i>	89
FITZHUGH v. MAXWELL. <i>Equity jurisprudence: Forfeitures: Land contracts.—Equitable title: Lien for purchase price: Foreclosure: Sale.—Vendor's claim: Money debt: Lien on the land.</i>	138
FOOTE, MOORE v.	443
FORT WAYNE & ELMWOOD R. W. CO. v. DETROIT. <i>Street railway: Ordinance: Construction: Repaving: Materials: Repairs.</i>	78
FOSTER, ALFRED, WILL OF.	21

	PAGE.
FOSTER v. GAFFIELD. <i>Special findings: General verdict: Inconsistency: Statute construed.—Special questions to the jury: Construction: Controlling general verdict.—Replevin: Possession: Detention.</i>	356
FOX v. HOLCOMB. <i>Eminent domain: Condemning lands for mill purposes: Petition.—Dams: Navigable stream: Authority from supervisors.—Proceedings to condemn lands: Petition: Jurisdiction.</i>	298
FRACTIONAL SCHOOL DISTRICT NO. 1, ETC., MASON v.	228
FROST v. LAWLER. <i>Contract relations: Agency: Authority.—Practice: Defendant in error: Appearance: Counsel: Attorneys of record.—Noticing cause for hearing: Service of assignment of errors: Waiver.</i>	235
GAFFIELD, FOSTER v.	356
GARTON v. UNION CITY NATIONAL BANK. <i>General issue: Corporate existence of plaintiff: Admission.—Promissory notes: Payable to cashier: Endorsement: Evidence.—Collateral security: Nature and amount of principal demand.—Charge to the jury: Oral instructions: Exceptions: Waiver.—Principal and surety: Negotiations for an extension: Contracts.</i>	279
GILMAN, DUNN v.	256
GLEASON, VAN AKEN v.	477
GOODRICH, WILBER v.	84
GRAHAM, SMITH v.	302
GRAND RAPIDS FURNITURE MANUFACTURING CO. v. BURNHAM. <i>Corporations: Inquest.</i>	29
GRAND RAPIDS, NEWAYGO & LAKE SHORE R. R. CO. v. ALLEY. <i>Railroads: Proceedings to condemn lands: Parties: Undivided interests: Practice: Joint owners: Dismissal.—Tenants in common: Partial condemnation.</i>	16, 18
GRAND RAPIDS & INDIANA R. R. CO. v. JUDSON. <i>Negligence: Railroads: Usual manner of running trains.—Question of fact: Weight of evidence.—Charge to the jury: Testimony of single witness.</i>	506
GRAND TRUNK RAILWAY CO., STEPHENSON v.	323
GREEN v. BELITZ. <i>Highways: Curative act: Private ways: Obstructions: Charge to the jury.</i>	512
GREEN, WILKINSON v.	221
GRINNELL, PARKER v.	199
GROVER & BAKER SEWING MACHINE CO. v. POLHEMUS. <i>Agency: Authority: Credit: Ratification: Liability of principal.—Statements of agent.—Horse keeping: Evidence.</i>	247
GROVER v. BUCK. <i>Attachment: Affidavit: Amount due.—Appraisers: Members of defendant's family.—Levy: Endorsement: Appraisal.—Trover: Growing crop: Measure of</i>	

	PAGE.
damages: <i>Evidence</i> .— <i>Constructive possession</i> : <i>Bond</i> .— <i>Statute of frauds</i> : <i>Interest in lands</i> : <i>Correct ruling</i> : <i>Immaterial remarks</i>	519
GUARDE, WILLIAMS v.	82
GUILFORD, KIMBERLY v.	250
GUSTIN v. BURNHAM. <i>Ejectment</i> : <i>Purchasers from administrators</i> : <i>Agreement to pay rent to widow</i> : <i>Dower</i> : <i>Terminating tenancy</i>	511
HACKETT, HEISRODT v.	283
HAESCIG v. BROWN. <i>Mortgages</i> : <i>Delivery of securities</i> : <i>Assignment without delivery</i> : <i>Payment</i> .— <i>Bona fide purchaser</i> : <i>Possession of securities</i> : <i>Notice</i> : <i>Payment to one holding the securities</i> : <i>Taking bond of indemnity</i>	503
HAGENBUCH v. HOWARD. <i>Equity jurisprudence</i> : <i>Taxes</i> : <i>Injunction</i> : <i>Remedy at law</i> .— <i>Injunction bill</i> : <i>Allegation of fraud</i> .— <i>Levy on personal property</i>	1
HATHAWAY v. MITCHELL. <i>Equity jurisprudence</i> : <i>Mill-dams</i> : <i>Abatement</i> : <i>Right of fowage</i> : <i>Purposes</i> .— <i>Grants of right of fowage</i> : <i>Quantity</i> : <i>Use</i> .— <i>Grant in fee</i> : <i>Restrictions</i> : <i>Construction</i> .— <i>Change of use</i>	164
HATHEWAY v. WEEKS. <i>Estates of deceased persons</i> : <i>Residuary legatees</i> : <i>Executors</i> : <i>Bonds</i> .— <i>Assets</i> : <i>Mistake</i> : <i>Equity jurisprudence</i> .— <i>Residuary legatee's bond</i> : <i>Administration</i> .— <i>Debts and legacies</i> : <i>Sufficiency of assets</i> .— <i>Practice</i> : <i>Injunction bill</i> : <i>Bond to pay judgment</i> : <i>Decree</i>	237
HAYES v. LIVINGSTON. <i>Estoppel in pais</i> : <i>Title to land</i> : <i>Statute of frauds</i> .— <i>Equity jurisprudence</i> : <i>Fraud</i> : <i>Release</i> : <i>Estoppel</i> .— <i>Boundary lines</i> : <i>Transfer of title</i> .— <i>Dedication of lands to public use</i> .— <i>Ejectment</i> : <i>Legal title</i>	384
HAZZARD, STADDEN v.	76
HEARTT, YOUMANS v.	397
HEISRODT v. HACKETT. <i>Dogs going at large</i> : <i>License</i> : <i>Construction of statute</i> .— <i>Dogs</i> : <i>Property</i> : <i>Value</i> .— <i>Killing unlicensed dogs</i> : <i>Authority to persons</i> : <i>Killing by another dog</i> : <i>Statute construed</i> .— <i>License and collar</i> : <i>Collar lost</i> : <i>Reasonable time to replace it</i>	283
HIGHWAY COMMISSIONERS OF GRAND RAPIDS, PEGLER v.	359
HIGHWAY COMMISSIONERS OF HAMTRAMCK, DETROIT SHARP-SHOOTERS' ASSOCIATION v.	36
HILL, CHAMBERS v.	523
HITCHCOCK, DANAHER v.	516
HOLCOMB, FOX v.	298
HOPE, CRIPPEN v.	55
HOWARD, HAGENBUCH v.	1
HOWARTH, MEARS v.	19
HOWELL, LINN v.	102

	PAGE.
HOWRY v. EPPINGER. <i>Promissory notes: Secured by mortgage: Evidence: Copy: Variance.—Endorsements.—Notice: Inquiry: Contents of mortgage.—Mortgage security: Authority to sell: Bona fide purchaser.—Blank endorsement: Instructions to agent.—Negotiable paper: Purchasers: Possible defenses.—Equities of prior holders.—Practice: New grounds of objection: Dealings between two firms having members in common.</i>	29
HUNGERFORD v. SMITH. <i>Foreclosures: Production of securities: Loss: Continued efficacy.—Lost securities: Long delay.</i>	300
ISMON, WILCOX v.	268
IVES, WOODRUFF v.	320
JOHN HANCOCK MUTUAL LIFE INSURANCE CO. v. MOORE. <i>Evidence: Admissions: Record evidence.—Documents: Purposes.—Life insurance: Administrator: Letters: Plaintiff's capacity.—Proofs of death: Admission: Documentary evidence.—Death: Circumstantial evidence.—Insanity.—Disappearance: Search.—Policy: Conditions: Self-killing: Penalty: Forfeiture: Burden of proof.—Suicide: Definition: Self-murder.—Classed with wrongful acts: Construction.—Insanity: Disease.—Special finding: Suicide: General verdict.</i>	41
JOHNSON, BRISTOL v.	123
JOHNSTON, FARWELL v.	342
JONES v. JUDGE OF KENT CIRCUIT. <i>Mandamus: Practice.</i>	373
JONES v. WATER COMMISSIONERS OF DETROIT. <i>Water rates: Taxes: Lien: Use of water.—Taxation: Water pipes: General tax: Local assessment.—Assessments: Specific tax.—Uniformity in taxation: Cash value: Frontage.</i>	273
JONES v. WRIGHT. <i>School moneys: Town treasurers: Action of town board.—Orders taken in payment of taxes.</i>	371
JUDGE OF KENT CIRCUIT, JONES v.	373
JUDGE OF KENT CIRCUIT, O'BLINSKIE v.	62
JUDSON, GRAND RAPIDS & INDIANA R. R. CO. v.	506
KAISER, LANGE v.	317
KIMBERLY v. GUILFORD. <i>Contracts: Party in interest: Private agreements: Estoppel.—Appropriating property of another: Promise to pay: Defense: Previous appropriation of defendant's property by plaintiff.</i>	259
KINNEY v. KINNEY. <i>Wills: Construction: Widow: Allowances.—Ambiguity: Evidence: Probable purposes.—Testator's circumstances: Intent.—Testator's property.—Change in circumstances.—Language used.</i>	250
KOHL v. LYNN. <i>Chattel mortgages: Registry: Subsequent purchasers or mortgagees in good faith.—Bona fide purchaser.—</i>	

	PAGE.
<i>Legal title : Sales by mortgagee : Accounting for proceeds.</i>	
— <i>Replevin : Special property : Mortgagee's interest.</i>	360
KURTZ, FINLEY SHOE & LEATHER Co. v.	89
LAMB, LINDSLEY v.	509
LANGE v. KAISER. <i>Practice : Evidence : Declining to rule on general offer to prove : Requiring questions to be put and ruled upon separately : Discretion.—Charge to the jury : General exceptions : Several distinct propositions.—Labor performed : Implied promise to pay.</i>	317
LAUGHNA, DETROIT v.	402
LAWLER, FROST v.	235
LELAND v. COLLVER. <i>Chattel mortgages : Goods subsequently acquired.—Contracts : Trusts in personal property : Continuing fund.—Transfers subject to the trust : Purchaser becomes trustee.—Double covenant : Breach of either : Defeasance : Right of foreclosure.—Sales : Consent : Condition : Forfeiture : Waiver.—Covenant to insure : Breach : Insurance by mortgagee.—Husband and wife : Business conducted by husband in the wife's name : Statements : Notice.</i>	418
LEONARD v. WOODWARD. <i>Attachment : Service : Certified copy : Inventory : Formal defects.—Default for want of plea : Affidavit : Record : Judicial notice.</i>	514
LEPPER, PERRIN v.	292
LINDSLEY v. LAMB. <i>Deeds : Execution in blank : Grantee : Consideration : Description : Agency : Authority.</i>	509
LINN v. HOWELL. <i>Charge to the jury : Immaterial matters.—Fraudulent purchase : Immaterial questions.</i>	102
LIVINGSTON, HAYES v.	384
LYNN, KOHL v.	360
MACOMBER v. NICHOLS. <i>Injury : Recovery : Lawful acts : Common rights.—Highways : Public use : Restriction : Inconveniences incident to reasonable use.—Horses : Superior privilege : Improved methods of locomotion.—Unsightly objects : Frightening horses of ordinary gentleness.—Steam locomotives : Negligence.—Engines : Reasonable management : Question of fact.</i>	212
MARKER, STOPLET v.	313
MARTIN, DETROIT v.	170
MASON v. FRACTIONAL SCHOOL DISTRICT NO. 1, ETC. <i>School districts : Assessor : Money had and received : Official bonds.—Accounting to successor : Notice of election and qualification.—Referees : Report : Finding of facts.—Omission : Practice.—Bill of particulars : Evidence.—Official treasurer : Accounting : Regularity of proceedings to raise the public moneys.—Moneys paid out on written orders.</i>	228
MATTER OF ALFRED FOSTER'S WILL. <i>Evidence : Wills : Pho-</i>	

	PAGE.
<i>tographic copies.—Contested will: Taking documents to the jury-room.—Forgery: Comparison of handwriting.—Opinions: Experts: Jury-room inquest.—Handwriting: Papers not in the cause.</i>	21
MAXWELL, FITZHUGH v.	138
MCARTHUR v. DUNCAN. Townships: Highway commissioners' orders: Remedy: Mandamus.	27
MCDIARMID v. CARUTHERS. Trespass: Declaration: Distinct acts: Election.—Rulings that do not prejudice.	49
MCEWAN v. ORTMAN. Written contracts: Parties signing without reading.—Promissory notes: Oral understanding.—Written instrument: Parol evidence.—Statute of frauds: Parol contract.—Land contracts: Agreement to surrender or release parcel: Defeasance: Re-sale.	325
MEARS v. HOWARTH. Equity jurisprudence: Taxes: Personal property: Injunction.	19
METROPOLITAN LIFE INSURANCE CO. v. ETHIER. Life insurance: False representations: Special defense: Notice: Application.—Evidence: Letter: Agency: Authority: Subsequent showing of want of authority: Practice.	277
MICHIGAN PAVING CO. v. COMMON COUNCIL OF DETROIT. Mandamus: Unliquidated demands.—Quantum meruit: Unperformed contract: Measure of damages.	201
MILLER v. THOMPSON. Fraud: Laches.—Deeds: Agreement to assume and pay a mortgage: Personal liability: Foreclosure.—Defenses: Validity of mortgages: Amount.—Foreclosure bill: Mortgagor: Parties.—Equity pleading and practice: Want of parties: Objection at the hearing.—Grantee assuming and agreeing to pay mortgage: Novation.	10
MITCHELL, HATHAWAY v.	164
MOORE v. FOOTE. Partnership dealings: Husband and wife: Frauds of husband.—Partnership: Due-bills: Payment: Transfer of title.—Dealings of individual member: Creditors.—Dealings between husband and wife: Agency.	443
MOORE, JOHN HANCOCK MUTUAL LIFE INSURANCE CO. v.	41
MOTT, PKOPLE v.	80
MURPHY v. WALTERS. Criminal complaints: False imprisonment.—Criminal proceedings: Public matters: Private interference: Presumptions.—Statement of facts.	180
MUSKEGON BOOMING CO. v. EVART BOOMING CO.	462
NICHOLS, MACOMBER v.	212
O'BLINSKIE v. JUDGE OF KENT CIRCUIT. Written findings: Judgment: Provisional action: Ejectment: Statutory new trial: Time.—Pendency of writ of error.	62
ORTMAN, MCEWAN v.	325
PALMER, WILMARTH v.	347

	PAGE.
PARKER v. GRINNELL. <i>Services: Agency: Evidence: Cross-examination.</i>	199
PEGLER v. HIGHWAY COMMISSIONERS OF GRAND RAPIDS. <i>Eminent domain: Highways: Notice: Meetings.</i>	350
PENNOYER CREEK IMPROVEMENT CO., CLAY v.	204
PEOPLE v. BROWN. <i>Bigamy: Void second marriage: Marriage of negro and white woman.—Gist of the offense: Two elements of illegality.</i>	339
PEOPLE, CAMPBELL v.	351
PEOPLE v. MOTT. <i>Fraudulent procurement of signature to written instrument: Statute construed.—Forgery.—Informations: Variance: Description: Amendments.</i>	80
PEOPLE, ROGERS v.	345
PEOPLE, YANER v.	286
PERRIN v. LEPPER. <i>Rents: Co-tenants: Non-joinder: Abatement: Apportionment.—Deeds: Grantor's interest.—Lessor: Grantee: Assignee.—Attornment.</i>	292
PIERCE, BRABON v.	39
POLHEMUS, GROVER & BAKER SEWING MACHINE CO. v. . . .	247
POPE v. CUTLER. <i>Deeds: Registry: Certificate: Seal.—Cases distinguished.—Probate courts: Wills probated abroad: Foreign probate: Jurisdiction.</i>	150
PULLMAN PALACE CAR CO., AUDITOR GENERAL v.	59
RAYMOND v. SHAWBOOSE. <i>Equity jurisprudence: Amount.—Indian treaty of October 18, 1864: Competency: Selection.—Sales of lands.—Indian agents: Decisions: Fraud: Executive department.—Specific performance: Cloud upon title: Decree: Remedy at law: Costs.</i>	142
REES, SUPERVISORS OF HOUGHTON COUNTY v.	481
REUSCH v. DEMASS. <i>Replevin bond: Transfer of the cause: Sureties.</i>	95
ROBBINS v. BARRON. <i>Tax liens: Statute construed: Subsequent tax title.</i>	517
ROBERTS v. WILKINSON. <i>Practice: Assignments of error: Abandonment.—Contracts: Promissory notes: Agreement to turn note upon a contract: Time: Extension.—Quantum meruit: Express contract: Payment in money.—Agreement to offset counter demands.—Endorsers: Representations by holder.—Security.—Evidence: Immaterial matters.</i>	129
ROBINSON, WYANDOTTE ROLLING MILLS CO. v.	428
ROGERS v. PEOPLE. <i>Rape: Cross-examination of prosecutrix.</i>	345
RUSSELL, ANDERSON v.	109
RYERSON, AVERY v.	362
SAGINAW CITY, BARBER v.	52
SEELEY, DUNCAN v.	369
SESSIONS, VOORHEES v.	99
SHAWBOOSE, RAYMOND v.	142

	PAGE.
SHEPARD, WILLETT v.	106
SMITH v. BROWN. <i>Justices' courts: Return day: Waiting an hour: Jurisdiction.—Variance: Bill to quiet title: Deed: Description of premises.—Fraud: Evidence: Good faith.—Fraudulent conveyances: Husband and wife: Execution sale.</i>	455
SMITH v. GRAHAM. <i>Mortgages: Subsequent purchaser: Recognition of the mortgage: Estoppel.—Agreement to pay increased rate of interest: Charge upon the land: Statute of frauds.</i>	302
SMITH, HUNGERFORD v.	300
SMITH v. SUPERINTENDENTS OF THE POOR OF LAPEER COUNTY. <i>Support of the poor by relatives: Proceedings not after the course of the common law: Review: Writ of error.</i>	58
SNYDER, WILLEY v.	60
SOLOMON, COLGROVE v.	494
STADDEN v. HAZZARD. <i>Written instruments: Construction.—Practice: Rulings that do not prejudice.—Lease: Mortgage: Construction: Wheat crop: Title.</i>	76
STAMBAUGH, BOYCE v.	348
ST. CLAIR, FARMER'S LOAN AND TRUST CO. v.	518
STEPHENS, BATTERSHALL v.	68
STEPHENSON v. GRAND TRUNK RAILWAY CO. <i>Railroad fences: Destruction by fire: Unreasonable delay.—Evidence: Reasonable diligence.</i>	323
STEWART v. ASHLEY. <i>Ejectment: Joint plaintiffs: Undivided interests: Severance: Anomalous proceedings: Objector equally at fault.—Ejectment: Guardian and ward: Guardian's sale: Limitations: Burden of proof.—Affirmative: Continuance of infancy.</i>	183
ST. GEORGE'S SOCIETY OF DETROIT, CREASEY v.	51
STOFLET v. MARKER. <i>Declaration: Plea to the merits: Failure to state any cause of action.—Pleadings: General issue: Waiver: Technical defects: Substantial allegations.—False representations: Statement of a cause of action.</i>	313
SUPERINTENDENTS OF THE POOR OF LAPEER COUNTY, SMITH v.	58
SUPERVISORS OF BAY COUNTY, ATTORNEY GENERAL v.	46
SUPERVISORS OF BENZIE COUNTY, ATTORNEY GENERAL v.	211
SUPERVISORS OF HOUGHTON COUNTY v. REES. <i>Errors that do not prejudice.—Tax-law: County treasurer: Forwarding delinquent tax-lists: Extensions: Time.—Official bond: Returns by tax collectors.—Official duty: Presumptions: Neglect of duty.</i>	481
TABOR, TOWN v.	262
TALIAFERO, EDWARDS v.	13
THOMPSON, MILLER v.	10
TOLLES v. DUNCOMBE. <i>Trespass to lands: Constructive possession: Tax-titles held by third persons.</i>	101

	PAGE.
TOWER v. DETROIT, LANSING & LAKE MICH. R. R. CO. <i>Aid to railroads: Contract: Consideration: Evidence: Preliminary negotiations: Discretion.—Opinions: Inquiries not susceptible of direct answer.—Finding of facts: Questions of fact: Practice.—Reasons: Review.—Promise in aid of railroad: Completion of road: Condition: Performance: Construction.—Interest: Happening of a specified event: Notice: Performance of condition.</i>	328
TOWN v. TABOR. <i>Replevin: Defense: Attachment proceedings: Contract rights.—Modes of service: Statute construed.—Return of service: Personal service: Service by copy: Service on agent.—Return: Amendment: Offer.—Res inter alios.—Attorneys: Dealings with client.</i>	262
TURNER, DALE v.	405
UNION CITY NATIONAL BANK, GARTON v.	279
VAN AKEN v. GLEASON. <i>Mortgages: Registry: Notice.—Simultaneous dates: Priority of acknowledgment.—Simultaneous mortgages: Foreclosure by advertisement: Marshalling assets.—Equity pleading and practice: Foreclosure: Ratable application of proceeds.</i>	477
VAN GILDER, BURNHAM v.	246
VOORHEES v. SESSIONS. <i>Register in chancery: Money paid into court: Official custody: Garnishment.</i>	99
WALTER, ANDERSON v.	113
WALTERS, MURPHY v.	180
WARD'S CENTRAL & PACIFIC LAKE CO. v. ELKINS. <i>Transportation contracts: Article of merchandize: Measure of damages.—Agreement to carry by vessel: Transportation by rail: Unreasonable expense.—Duty of shipper: Immediate action: Speculating on future chances.—Evidence: Agency: Steamboat clerk: Statements.—Contract: Inferences: Actual terms.</i>	439
WATER COMMISSIONERS OF DETROIT, JONES v.	273
WATERMAN v. WATERMAN. <i>Practice in supreme court: Assignment of errors.—Bill of particulars: Money loaned: United States bond loaned.—Evidence: Pecuniary ability of plaintiff: Rebuttal.—Money loaned to pay off mortgage: Declarations: Admissions.—Money loaned with which to pay off incumbrances: Securities.</i>	490
WEEKS, HATHEWAY v.	237
WHITTEN v. WRIGHT. <i>Debtor and creditor: Negotiable paper: Collateral security: Failure to protest.—Promissory notes: Drafts.—Injury: Evidence: Insolvency of maker.—Value.—Fraudulent misrepresentations.—Warranty: Issue.</i>	92
WILBER v. GOODRICH. <i>Estoppel: Execution sale: Bidding.—Evidence: Transcript: Judgment.</i>	84
WILCOX v. ISMON. <i>Affidavit for capias: Conversion.—Appear-</i>	

	PAGE
ance bail: Officer making the arrest: Under sheriff: Obligee.—Bail pieces: Waiver: Bond.—Bail bonds: Assignment: Seal.—Official character.—Acceptance of plea.—Measure of damages: Judgment.—Sureties: Failure to put in special bail.—Neglect to proceed against the sheriff: Option.	268
WILKINSON v. GREEN. Foreclosure: Parties: Subsequent purchasers: Multifariousness.—Adverse title.—Releases obtained to cure defects: Decree.—Conveyances: Delivery of possession: Estoppel.	221
WILKINSON, ROBERTS v.	129
WILLETT v. SHEPARD. Promissory notes: Alteration: Burden of proof.	106
WILLEY v. SNYDER. Chattel mortgages: Description of property: Defaultness: Notice.—Interpretation: Surrounding facts.—Identification.	60
WILLIAMS v. GUARDE. Services in aid of prostitution: Brothel: Mistress.—Defense based on one's own turpitude: Costs.	82
WILMARTH v. PALMER. Tenants in common: Use and occupation.—Co-tenants: Adverse holding: Landlord and tenant: Rent.	347
WINFIELD v. ADAMS. Execution sales of personalty: Place: In view of the property.—Growing crops.—Execution levy and sale: Officer's return: Parol evidence.—Dealings between employer and employe: Good faith.	437
WOODRUFF, AMERICAN INSURANCE Co. v.	6
WOODRUFF v. IVES. Log-lien law: Special proceedings: Construction: Affidavit.—Kind of services performed.—Jurisdictional defects: Appearance and plea to the merits: Waiver.	320
WOODWARD, LEONARD v.	514
WRIGHT, JONES v.	371
WRIGHT, WHITTEN v.	92
WYANDOTTE ROLLING MILLS Co. v. ROBINSON. Superior court of Detroit: Rules of practice: Time to appear and plead.—State policy: Uniformity.—Rule to plead: Time: Statutory regulation: Circuit courts.—Authority to make rules: General rules of practice.	428
WYMAN, CURLEY v.	353
YANER v. PEOPLE. Criminal examinations: Presentment by grand jury.—Criminal complaints: Examination: Warrant: Offense charged.—Different degrees.—Duties of magistrate.—Examining magistrate.—Specific offense: Murder: Manslaughter: Information: Motion to quash.	286
YOUNG v. HEARTT. Practice: Mistakes of jury: Computation: Motion for new trial.—Interest: Proceeds of sales: Duty to pay over.—Application of payments: Statement of account: Disclaimer.—Pro rata distribution: Payments.	397

APRIL TERM, 1876.

(CONTINUED FROM VOL. XXXIII.)

Aaron Hagenbuch v. Aaron Howard and another.

Equity jurisprudence: Taxes: Injunction: Remedy at law. Equity will not interfere by injunction to restrain the collection of a tax, where the complainant has an adequate remedy at law.

Taxes: Injunction bill: Allegation of fraud: Remedy at law. A charge in the bill, that the supervisor acted fraudulently in making and in afterwards refusing to correct his assessment, will not confer jurisdiction in equity, where it does not further appear that adequate relief is not practicable in a court of law.

Taxes: Levy on personal property: Remedy at law. Where personal property sufficient in amount has been levied upon to satisfy a tax on bank stock which is claimed to be illegal and void, the remedy at law is adequate; an action of trover for the value of the property seized would raise the question, or complainant might pay the amount of the tax under protest, and afterwards test the validity of the tax in an action to recover back the amount paid.

Heard April 6. Decided April 18.

Appeal in Chancery from St. Joseph Circuit.

This was a bill to restrain the collection of a tax upon shares of bank stock which the complainant alleges did not belong to him, but which the supervisor assessed to him notwithstanding notice of its transfer to his sons. The bill avers that a sufficient quantity of wheat belonging to complainant to satisfy the tax had been seized by the township treasurer, and it prays an injunction against further proceedings to collect the tax or enforce the levy. A demurrer was interposed to the bill and sustained, and the bill dismissed. The complainant appealed.

H. H. Riley, for complainant.

HAGENBUCH v. HOWARD.

This court has held, from *Williams v. Mayor, etc.*, of *Detroit*, 2 *Mich.*, 560, down to *Youngblood v. Sexton*, 32 *Mich.*, 406, that "chancery will not assume jurisdiction to restrain by injunction the collection of an assessment, under a warrant against, and levy upon the goods and chattels of the complainant, but will leave the person to his remedy at law."

This, we apprehend, however, is where an *illegality* or *irregularity* is charged upon some officer in making up the roll, or in collecting the taxes.

But this court has not held that where the officer who makes the assessment is charged with *fraud*, it will not interfere. But on the contrary, *hints* the reverse in *Motz v. Detroit*, on page 515 of the opinion, where it says: "It is not charged that any mistake or *fraud* has intervened;" and on page 516, "so long as its members [common council] are guilty of no *intentional wrong* or *corrupt conduct* in the discharge of their duties, the courts have no control," etc., etc. And this court not only *hints*, but *decides*, it seems to me, the whole question in *Merrill v. Humphrey*, 24 *Mich.*, 170. See also *Tong v. Marvin*, 15 *Mich.*, 60.

The complainant in that case averred "that the supervisors of the several townships in which his lands were situated fraudulently assessed the same above their value, and relatively very much beyond the assessment of other property, for the purpose of relieving resident tax payers from their proportion of taxes."

On demurrer, the court held that it had jurisdiction (although for *other reasons* it dismissed the bill without prejudice), and said "the supervisors have not brought their judgment to bear upon the question of value, but have set aside and disregarded their duty, for the express purpose of perpetuating a *wrong* upon an individual." And it was because the court had jurisdiction in cases of fraud, that the court dismissed the bill *without prejudice*.

Lord Hardwicke said, in *Chesterfield v. Janssen*, 2 *Vesey*, 155, "that a court of equity has an undoubted jurisdic-

HAGENBUCH v. HOWARD.

tion to relieve against every species of fraud.”—1 *Story's Eq. Ju.*, 190.

John B. Shipman, for defendants, cited: *Williams v. Mayor, etc.*, 2 *Mich.*, 560, 581-4; *Henry v. Gregory*, 29 *Mich.*, 68; *Youngblood v. Sexton*, 32 *Mich.*, 406; *Taft v. Stewart*, 31 *Mich.*, 367.

MARSTON, J:

We are of opinion that the demurrer was well taken. The property was separately and specifically described upon the assessment roll. The complainant had done every thing he was required by law to do to prevent the assessment being made, and the treasurer had, in order to collect the tax, made a levy upon personal property sufficient in value to satisfy the amount. The complainant had therefore a plain adequate remedy at law. Upon such a trial no difficulty would be experienced in proving the erroneous assessment, and that it was not a mere error in judgment as to the value of property actually owned by complainant. In an action of trover for the value of the wheat seized, the validity of this tax could have been tested, or the complainant might have paid the amount of such tax under protest, and afterwards have tested the validity of the tax in an action to recover back the amount paid.—*Smith v. First National Bank*, 17 *Mich.*, 479; *First National Bank v. Watkins*, 21 *Mich.*, 489.

It has been repeatedly held in this state, that equity will not assume jurisdiction to restrain by injunction the collection of a tax under such circumstances.

It is said that the bill charges that the supervisor acted fraudulently in making and in afterwards refusing to correct his assessment, and that under this charge the court has jurisdiction.

The charge of fraud, however, is not sufficient. It should further appear that adequate relief was not practicable in a

HAGENBUCH v. HOWARD.

court of law: such is not this case.—*Teft v. Stewart*, 31 Mich., 371.

Complainant having therefore an adequate remedy at law, the decree of the court below dismissing the bill must be affirmed, with costs.

The other Justices concurred.

Robert Blackwood v. William Brown.

Declaration: Moneys wrongfully detained: Common counts. Where one has deposited with another securities to indemnify the latter for signing as a surety the former's bond to pay and satisfy certain mortgages, he may, after performance of the condition of the bond, recover under the common counts the moneys collected on the securities; there is no more occasion for declaring specially on the contract than there would be for setting forth the special circumstances in other cases where one is wrongfully detaining the property of another.

Collateral securities: Bond to third person: Performance satisfactory to obligee: Surety. One who has received securities to protect him for having signed another's bond to a third person, conditioned that the obligor should procure a discharge of certain mortgages on lands conveyed by him to the obligee, cannot, when called upon after performance to refund, set up in defense any technical objections to the discharges procured, where they were satisfactory to the party for whose benefit they were obtained and he has delivered up the bond as satisfied.

Contracts: Written instrument: Distinct parol agreement: Evidence. A written contract between parties does not preclude the proving another distinct transaction entered into at the same time, which rested in parol, and which does not vary the written contract and is not inconsistent with it.

Another suit pending: Bar. A prior suit pending in which there can be no recovery because it was prematurely brought, is no bar to a recovery in a new suit for the same cause of action.

Heard April 6. Decided April 18.

Error to Superior Court of Detroit.

Henry M. Cheever, for plaintiff in error.

Moore & Griffin and F. A. Baker, for defendant in error.

BLACKWOOD v. BROWN.

COOLEY, CH. J.:

The action in the court below was brought by Brown to recover from Blackwood the amount of certain securities which he had deposited with Blackwood, and which the latter did not account for. For all but one of these, Blackwood had given a written receipt specifying that they or the moneys received thereon were to be returned to Brown when two certain mortgages were discharged. The discharge, it appears, was to be obtained for the benefit and protection of one Whittaker, to whom Brown had conveyed the lands covered by the mortgages, and Blackwood was concerned only as having joined Brown in a bond to protect Whittaker against the mortgages. The securities were deposited with him for his protection as surety in this bond.

The declaration was on the common counts, and the first exception in the case is to the ruling of the court that the plaintiff, if the mortgages were discharged so as to entitle him to the securities, was entitled to sue without declaring specially. This ruling was correct. When Brown had performed his undertaking, the agreement between himself and Blackwood became wholly immaterial, except as a matter of evidence, and there was no more necessity for declaring specially upon it than there would be for setting forth the special circumstances in other cases when one is wrongfully detaining the property of another. The plaintiff was not suing on the contract, but on his ownership; and the contract was only explanatory of defendant's possession.

Evidence was put in by the plaintiff to show that the two mortgages had been duly discharged. Some technical objections were made to the sufficiency of these discharges, but we are relieved from the necessity of considering them critically by the evidence of Whittaker that they were satisfactory to him, and that he delivered up the bond of indemnity as having been satisfied. If Whittaker accepted the discharges, that was all that Blackwood could require.

The plaintiff was permitted to show that besides the

BLACKWOOD v. BROWN.

securities mentioned in the receipt, a certain mortgage was also put into Blackwood's hands by him. This was objected to on the ground that the written receipt must be presumed to embody the whole contract between the parties. But no such paper precludes either party from showing that there was another transaction between the parties at the same time. It does not vary the written contract, and is in no manner inconsistent with it.

The only other exception which requires notice relates to another suit which was once before us and was remanded for a new trial.—*Blackwood v. Brown*, 29 Mich., 483. In that suit the plaintiff sought to recover for these securities, but failed because the mortgages were not discharged when he brought it. That suit has not been discontinued, but as there can be no recovery in it for the cause of action now relied upon, it is obvious that it cannot be in the way of a new suit, brought after the mortgages were discharged.

The judgment must be affirmed, with costs.

The other Justices concurred.

The American Insurance Company of Chicago, Illinois v. Oliver E. Woodruff.

Premium note: Insurance policy: Surrender: Notice: Delivery to a stranger.

A surrender of an insurance policy, such as to discharge the insured from liability on a premium note, under an arrangement that upon surrendering the policy the note should be delivered up, must be accomplished by a dealing immediately and directly with the company or its agents; and a delivery to a stranger, with notice to the company, is not enough.

Premium note: Suit by foreign corporation: Record: Presumptions: Plaintiff's course of proof. Where in a suit by a foreign corporation upon a premium note, the plaintiff, as part of its case, introduced evidence of its authority to do business in Michigan, a court of review may legitimately assume, though the record does not otherwise disclose it, that the contract of insurance was made in Michigan.

AMERICAN INSURANCE CO. OF CHICAGO v. WOODRUFF.

Premium note: Suit by foreign corporation: Evidence: Authority to contract: Presumptions. But where objection taken to the admission in evidence of the note sued upon, on the ground that there had been no showing that plaintiff was authorized to do business in Barry county, was overruled and no reason given, it will not be presumed against this ruling, in the absence of any thing in the record to show it, that the contract of insurance was made in that county, though the plaintiff's course of proof indicates it was made in Michigan.

Practice: Presumptions. Nothing will be presumed against the correctness of a ruling, which does not appear by the record.

Bills of exceptions: Evidence: Misstatements. The statement in the bill of exceptions, that all the evidence is set forth, when it is manifest such is not the fact, is misleading and wrong.

Heard April 7. Decided April 18.

Error to Barry Circuit.

James A. Sweezey, for plaintiff in error.

Charles G. Holbrook and *William Burgher*, for defendant in error.

CAMPBELL, J :

Plaintiff sued defendant in Barry county upon a premium note dated March 7th, 1872, and payable in annual installments. The defenses set up specially were, fraud in the procurement of the note, failure as a foreign corporation to comply with the insurance laws, and a special bargain that the policy might be surrendered, and that it was surrendered.

Defendant was allowed, against objection, to show that at the time the policy was executed he made a verbal agreement with plaintiff's agent that he might surrender the policy whenever he should see fit, and that upon surrendering the policy the note should be delivered up, and no further premiums become due. And under this arrangement he showed that some time in the year 1874 (but whether any installment was in arrears then does not appear), "he surrendered his said policy by giving it over to one Brown, the agent of another insurance company," giving notice thereof to the agent of the plaintiff.

AMERICAN INSURANCE CO. OF CHICAGO V. WOODRUFF.

The bill of exceptions does not set forth the terms or conditions of the written policy. But the evidence showed no surrender to the company. In the absence of some explanation, a surrender could not very well be made out without dealing immediately and directly with the company or its agents. Notice cannot amount to a surrender (unless so agreed), without giving up the policy. Here the policy was given up to a stranger, and the agent was not bound to hunt him up to obtain it. It should have been given to the agent or transmitted so as to reach him or his principal.

There being no surrender, the validity of the agreement becomes of no importance, and need not be considered. In the somewhat meager and ambiguous state of the record, it would be useless to attempt it, where the question is not likely to arise again.

It is urged that if there was error in holding the policy surrendered, it becomes immaterial by reason of a failure to prove a right to sue at all. It is claimed the plaintiff has failed to show any right to do business in Michigan, and cannot recover on a premium note for a Michigan policy.

Although the note bears no mention of the place where it was made, and is payable generally, and although the bill of exceptions is so drawn as not to show where the policy was issued, or by whom, yet the plaintiffs, by introducing as a part of this case their Michigan authority, thereby showed that they meant to meet the case as a Michigan transaction. A first impression led strongly to the belief that the record showed that the plaintiffs made out no cause of action. But upon considering the objections taken on the trial, this conclusion seems erroneous.

The first papers introduced were the certificates and licenses from the state commissioner's office, showing that the plaintiffs had brought themselves within the requirements of the statutes, so far as this could be done by filing all the needful papers and evidences with the secretary of state or insurance commissioner. Objection was made that these

AMERICAN INSURANCE CO. OF CHICAGO v. WOODRUFF.

papers were immaterial, and did not comply with the requirements of the statutes. This objection was overruled, as it properly should have been. Whether these were all the evidences required or not, they were certainly good as far as they went.

The note in question was introduced, and was met with the objection that there had been no showing that the plaintiffs were authorized to do business in the county of Barry. This objection was overruled also, and for what reason does not appear. But as it is not shown by the bill of exceptions that either note or policy was made in Barry county, we cannot presume that they were, nor can we presume any thing against the correctness of the ruling which does not appear. While the course of plaintiff's proof authorizes us to assume the contract was made in Michigan, it does not authorize an assumption that it was made in any particular county.

We must assume for the purposes of the present hearing, that the court below ruled correctly on the power to sue upon the note, and therefore the error concerning the surrender of the policy was material.

We notice in this record a statement that all the evidence in the case is set forth, when it is manifest such is not the fact, and we have been unable to ascertain what was shown on the most important fact in the case. This method of statement is misleading and wrong.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

34 MICH.—2

MILLER v. THOMPSON.

Sidney D. Miller v. Jonathan Thompson and another.

Fraud: Laches. Where one has made payments of interest upon a mortgage which by deed to him he has assumed to pay, and has made no complaint for a year and a half, he will not be heard to urge in defense to the clause in the deed whereby he assumed such mortgage, that it was fraudulently inserted in the deed.

Deeds: Agreement to assume and pay a mortgage: Personal liability: Foreclosures. One who in the purchase of land has had deducted from the purchase price the amount of certain mortgages, and has taken a deed providing that he shall assume and pay such mortgages, is personally liable to the mortgagee to pay the same; and such personal liability may properly be enforced in a suit to foreclose the mortgage.

Agreement to assume and pay mortgages: Defenses: Validity of mortgages: Amount. A grantee who has accepted such a deed cannot dispute either the legal execution of the mortgages or the amount thereof as specified in the proviso of the deed; such an arrangement is equivalent to a direction from the grantor to the grantee to pay so much of the purchase price to the mortgagee, and the grantee is liable to pay the amount he undertakes to, and no more and no less.

Foreclosure bill: Mortgagor: Parties. The mortgagor in such a case is not a necessary party to the foreclosure suit, where no relief is sought against him personally.

Equity pleading and practice: Want of parties: Objection at the hearing. An objection for want of parties, when not taken by any pleading, but raised for the first time at the hearing, will not prevail unless the defect be one that precludes a decree that will do justice as between the parties and fully determine the controversy.

Grantee assuming and agreeing to pay mortgage: Novation. No novation is required, in case of such a deed, to substitute the grantee as the debtor, at the election of the mortgagee, in the place of the mortgagor.

Heard April 7. Decided April 18.

Appeal in Chancery from Superior Court of Detroit.

John H. Bissell and William P. Wells, for complainant.

A. J. Chapman, H. M. Cheever and F. A. Baker, for defendants.

COOLEY, CH. J:

The bill in this case was filed to foreclose two mortgages given by Sackfield Macklin upon lands subsequently sold by him to the defendant Thompson. The deed to Thompson was the usual warranty deed with the following clause added

MILLER v. THOMPSON.

at the conclusion: "Excepting, however, as against two certain mortgages held by Sidney D. Miller, of Detroit, amounting to six thousand dollars, as of this date, which mortgages the party of the second part assumes and agrees to pay." One of these mortgages had previously by mistake been discharged of record, and the bill sought to have this discharge set aside, and prayed a personal decree against Thompson for the amount found due.

Thompson, by his answer, set up fraud in the insertion in the deed from Macklin to himself of the clause by which he was made chargeable with the payment of the mortgages. He also denied the legal execution of the mortgages, denied that so much was due upon them as was recited in the Macklin deed, and relied upon the discharge of record, which, as has been stated, had been entered as to one of them. In the argument in this court he relied also upon the following points: *First*, that complainant was not entitled to a personal decree against him because the facts made out no novation which would substitute him as the debtor in place of Macklin; *Second*, the bill was fatally defective because the mortgagor was not made a party.

The allegation of fraud is not sustained by the evidence. The preponderance of testimony is clearly against it, and Thompson's own conduct after he admits being aware of the exact terms of the deed was inconsistent with the defense he now sets up. He made no complaint for a year and a half, making in the meantime payments of interest on the mortgage in full recognition of the whole amount which the deed made chargeable upon him. Nor is Thompson in position to dispute either the legal execution of the mortgages or the amount which Macklin by his deed admits was at that date due and payable upon them. It clearly appears that Thompson in purchasing of Macklin was allowed for the six thousand dollars as a part of the purchase price which was to be paid by him, and the effect of the arrangement was, that Macklin ordered it to be paid to Miller. Thompson has consequently no concern with the question of

MILLER v. THOMPSON.

the legal execution of the mortgages, or with the amount due. He is simply called upon to pay the purchase price in the manner agreed upon between Macklin and himself. If Macklin had legal defenses to the mortgages, he waives them in this arrangement, and if he directs more to be paid to Miller than is actually due, that fact concerns no one but Miller and himself. Thompson should pay what he agreed to pay, no more and no less.

Various objections are made to the allegations in the bill, and to the supposed failure to support them by the evidence. We do not notice these in detail, because we are satisfied they demand a higher degree of accuracy and particularity in chancery pleading than is required by the practice or by any rules of convenience. It is sufficient to say, that the substantial allegations of the bill are all supported by the evidence, and that they are sufficient to warrant the decree which was rendered.

It would have been very proper to make Macklin a party defendant, but it was not absolutely necessary. No relief was sought against him, nor could any decree be rendered that would injuriously affect his interests. It is true that he may have deductions or claims that he would be entitled to have allowed to him if he were proceeded against on the mortgage debt, but he certainly cannot complain if Miller collects of his vendee the sum that in the sale he has directed the latter to pay over to Miller. If this overpays Miller, Macklin may call upon him to account; but the decree in this case will protect Thompson, and that is all he can insist upon. It is to be observed, also, that the objection for want of parties was not taken by any pleading, but for the first time at the hearing. At that stage of the case any defect that does not preclude a decree that does justice as between the parties and fully determines the controversy as between them, should be overlooked.—*Payne v. Avery*, 21 Mich., 524. But if the objection had been taken by pleading, it would not have been available.—*Swift v. Edson*, 5 Conn., 531; *Shaw v. Hoadley*, 8 Blackf., 165.

MILLER v. THOMPSON.

The objection that there was no such novation as made Thompson the debtor instead of Macklin was also unavailable. It was not essential there should be a novation; it was sufficient that Thompson, as between himself and Macklin, had agreed to pay the mortgage. That agreement brings the case within the equity of the statute which provides that "if the mortgage debt be secured by the obligation or other evidence of debt of any other person besides the mortgagor, the complainant may make such person a party to the bill, and the court may decree payment of the balance of such debt remaining unsatisfied, after a sale of the mortgaged premises, as well against such other persons as the mortgagor, and may enforce such decree as in other cases."—*Comp. L. 1871, § 5150; see Crawford v. Edwards, 33 Mich., 354.*

The decree, which was entered in favor of complainant, must be affirmed, with costs of this court.

The other Justices concurred.

Albert M. Edwards v. George E. Taliafero and another.

Stipulations: Evidence: Record: Practice. A case will not be considered in a court of review in the light of a stipulation of facts alone, where by the record it appears that on the trial a further showing was made.
Guardians: Mortgages: Probate proceedings: Statute construed. A mortgage given by a guardian upon the property of his ward, by virtue of proceedings sought to be taken under the statute (*Comp. L. 1871, § 4026*), is void where the probate court nowhere in the course of the proceedings has specified or determined, as required by the statute, the amount, rate of interest, or length of time for which the mortgage was authorized to be given.

Tax-titles: City tax-lease: Excessive assessment. A city tax-lease, given on a sale for delinquent taxes, is invalidated by a showing that an excess of over twelve thousand dollars was assessed and spread upon the roll

EDWARDS v. TALIAFERO.

of the city for that year, and that a portion of the same entered into the amount of taxes for which the property in question sold.

Heard April 7. Decided April 18.

Error to Wayne Circuit.

This was an action of ejectment. On the trial the following facts were admitted by the counsel for the respective parties, such admissions being recorded by the official stenographer:

1. That the plaintiff claims title in fee to the lot in question; that possession was withheld by defendants from December 1st, 1874, and that at the commencement of suit defendant Meyers was in possession as a tenant under defendant Taliafero, and that the latter claimed title.

2. That on February 10, 1869, defendant Taliafero was a minor under twenty-one; was possessed of the lot in question in fee; that on that day his duly appointed guardian, Virginia Noel, applied to the probate court of the county of Wayne for license to mortgage this lot for the benefit of her ward, the defendant Taliafero.

3. That on the 16th day of March, 1869, license was granted by the probate court, and that the guardian filed a bond, with sureties which were approved by the probate court under the statute, to apply and account for the moneys received.

4. That on the 9th of December following, that is 1869, the guardian executed a mortgage under said authority to the plaintiff, Albert M. Edwards, for six hundred dollars; that on the 11th day of July, 1873, the plaintiff caused the mortgage, then having become due and payable, to be foreclosed by advertisement, and that he became the purchaser of the lot at the foreclosure sale; that the foreclosure proceedings were formal and according to law, and regular.

Both parties introduced evidence also to maintain the issue on their part. The trial was by jury, and a verdict

EDWARDS v. TALIAFERO.

was rendered for defendant by direction of the court. The plaintiff brought error.

Henry M. Cheever, for plaintiff in error.

Van Dyke & Brownson and *F. A. Baker*, for defendants in error.

MARSTON, J :

It is unnecessary to determine what the effect of the stipulation in this case would have been had no other showing been made on the part of the plaintiff in error, who was plaintiff in the court below. He deemed it necessary to introduce the petition and proceedings in the probate court, authorizing the property to be mortgaged by the guardian of defendant Taliafero, under which plaintiff claimed title. Those proceedings affirmatively showed that the statute had not been complied with. *Sec. 4626, 2 Comp. Laws*, provides that the order of the probate court shall specify the amount to be secured by such mortgage, the rate of interest to be paid, and the length of time for which such mortgage shall be given. The petition was simply for leave to raise five hundred dollars,—no rate of interest or time when to become due was mentioned either in the petition or order, nor was there any report or order of confirmation afterwards, so that the probate court did not in any manner or at any time pass upon these questions. Under such circumstances we are of opinion that the plaintiff acquired no title under the mortgage given by the guardian, and that the ruling of the court below upon this question was correct.

Plaintiff in error also claimed under a tax lease, executed by the comptroller of the city of Detroit upon a sale of the land in question for delinquent taxes for the year 1870. It appears that there was an excess of over twelve thousand dollars assessed and spread upon the rolls of said

EDWARDS v. TALIAFERRO.

city for the year 1870, and that a portion of the same entered into the amount of taxes for which this property was sold. This rendered the sale invalid. We do not deem it necessary to consider the other questions raised.

The judgment must be affirmed, with costs, and the record will be remanded to the court below for further proceedings under the statute.

The other Justices concurred.

The Grand Rapids, Newaygo & Lake Shore Railroad Company v. George Alley and another.

Railroads: Proceedings to condemn lands: Parties: Undivided interests. It is requisite in proceedings to condemn land for railroad purposes, where the whole parcel is required and found necessary, to have all the tenants in common thereof before the court; and it is not competent to proceed separately against the owners of an undivided interest while another undivided interest remains outstanding.

Practice: Proceedings to condemn lands: Joint owners: Dismissal. And a dismissal of such proceedings as to a portion of the joint owners, for want of service, is practically a dismissal as to all, since it leaves the court without power to proceed further with the inquest.

Heard April 11. Decided April 18.

Appeal from Probate Court of Newaygo County.

No counsel appeared for the railroad company.

Smith, Nims & Erwin, for respondents.

CAMPBELL, J:

The appellee, a railroad company organized under the general railroad laws of this state, applied to the probate court of Newaygo county to obtain a condemnation of lands. It set forth that only three parcels were required to be taken

GRAND RAPIDS, NEWAYGO & LAKE SHORE R. R. COMPANY
v. ALLEY.

in that county, one belonging to Benjamin Coolbaugh, a second to Samuel Thomas, and a third to respondents, George Alley and George M. Smith, and Charles G. Alley and James Alley.

Upon the day when the parties were required to appear, the respondents appeared, but no service was shown on Charles G. Alley or James Alley, and as to them the petition was dismissed. Further proceedings, against which several objections were made, were had, which resulted in a finding that it was necessary to use the property, that each of the respondents named had an undivided fourth interest in the third parcel, and that each of them should receive seventy-five dollars damages, the value of the whole being assessed at three hundred dollars.

As it appeared on the face of the proceedings that the respondents owned only an undivided half, and as the whole of the parcel was required and found necessary, and the remaining half was owned by persons known and named, it was absolutely necessary to have all the owners of the same parcel before the court. A railroad cannot be built on less than the whole estate, and the statute does not permit the absurdity of having the necessity of taking two undivided interests in the same parcel determined separately. If either half is not needed, the rest cannot be. The statute (§ 2315) is express, that a copy of the petition must be served, actually or constructively, "on all persons whose interests are affected by the proceedings." Wherever the owners of any parcel are not all before the court, no proceeding can be had which will affect any of their interests, because a single outstanding interest, if found unnecessary by a jury, would defeat the entire proceeding.

By dismissing the proceedings as against Charles and James Alley, they were, therefore, practically dismissed as to all, and there was no further power in the court to proceed with the inquest.

As the railroad company has not appeared in this court,

GRAND RAPIDS, NEWAYGO & LAKE SHORE R. R. COMPANY
v. ALLEY.

and as this defect is jurisdictional, it would not be wise, on an *ex parte* hearing, to decide the other numerous and important questions presented by the record.

The proceedings must be quashed, with costs of both courts. There is nothing to amend by.

The other Justices concurred.

**The Grand Rapids, Newaygo & Lake Shore Railroad
Company v. Charles G. Alley and another.**

Railroads: Proceedings to condemn lands: Parties: Tenants in common: Partial condemnation. Under a statute requiring all parties interested to be brought in, it is not competent, in proceedings to condemn land, to dismiss as to a portion of the joint owners and proceed as to others; a partial condemnation of an undivided interest can furnish no benefit to a railroad in building its track.

Heard April 11. Decided April 18.

Appeal from Probate Court of Newaygo County.

No counsel appeared for the railroad company.

Smith, Nims & Erwin, for respondents.

CAMPBELL, J:

In this case a petition to the probate court for the condemnation of lands set forth that there was necessity for condemning, for the purposes of the petitioner's railroad, no lands in Newaygo county except the undivided half of certain lands described, and that respondents were the only persons interested in such undivided half. The petition was referred to a jury, who found the necessity and condemned the interest in question.

GRAND RAPIDS, NEWAYGO & LAKE SHORE R. R. COMPANY
v. ALLEY.

During the hearing an amendment was allowed which set forth that the land in which respondent owned an undivided half was owned by them and George Alley and George M. Smith equally, as tenants in common holding each one-fourth interest, and that proceedings had been had under the railroad law to condemn the interest of George Alley and George M. Smith, which had been confirmed, and that further separate proceedings were pending against the interest of James Alley, and that the present proceedings were instituted to reach only the interest of Charles G. Alley.

This was practically a dismissal as to James Alley, and was in direct violation of the statute which requires all parties in interest to be brought in. This question is disposed of in the appeal of George Alley and George M. Smith, *supra* p. 16, and need not be further discussed. A partial condemnation of an undivided interest can furnish no benefit to a railroad in building its track.

The remaining questions are not important where the want of jurisdiction is manifest.

The proceedings must be quashed, with costs of both courts.

The other Justices concurred.

Charles Mears v. Henry Howarth.

Equity jurisprudence: Taxes: Personal property: Injunction. Equity will not interfere to restrain the collection of a tax upon personal property, the remedy at law being ample and plain.

Submitted on briefs April 11. Decided April 18.

Appeal in Chancery from Oceana Circuit.

MEARS v. HOWARTH.

Standish, Rutherford & Hubbard, for complainant.

Rice, Ambler & Montgomery, for defendant.

MARSTON, J:

Complainant filed his bill to be relieved from the collection of certain alleged illegal taxes, alleging that the supervisor had assessed his lands higher in proportion than other lands of like value in the same township. He also alleged that he was, and had for a long time been a resident of Lincoln, Mason county, and that the treasurer of the township of Golden, Oceana county, had assessed his personal property in that township; that the same was not subject to assessment in the township of Golden, but was subject to and had been assessed in said township of Lincoln. The bill further alleges that he took the necessary and proper steps to have such assessments corrected, but that the supervisor refused; and he prays that the defendant, who is treasurer of the township of Golden, may be restrained from proceeding to collect such taxes. An answer was put in, and proofs taken. Upon the hearing the court below decreed that the tax assessed upon the personal property was null and void, and perpetually enjoined the collection of the same. From this decree the defendant appealed.

This case comes directly within that of *Hagenbuch v. Howard*, *supra*, p. 1. The complainant had a plain, adequate remedy at law, admitting the allegations in his bill to be true, in reference to the assessment of the personal property; and that is the only question in this court, the complainant not having appealed. For these reasons the decree of the court below must be reversed, and a decree entered dismissing the bill, with costs of both courts.

The other Justices concurred.

MATTER OF ALFRED FOSTER'S WILL.

In the matter of the Appeal from the Probate of the
Will of Alfred Foster.

Evidence: Wills: Photographic copies. While it might not be error to permit photographic copies of a will which was in controversy to be given to a jury, with such precautions as to secure their identity and correctness, yet their use can never be compulsory, and their rejection cannot be urged as error.

Contested will: Taking document to jury room. The refusal to require the original will to be taken to the jury room, when the jury had not desired it, and against the objection of one of the parties, is held not contrary to law or good practice.

Wills: Forgery: Comparison of handwriting: Jury room. Where the genuineness of a document is in dispute, it would be hazardous to permit the jury to take the instrument to their jury room, for the purpose of a comparison of the handwriting of the body of it with that of the signature, to aid them in determining whether it was a forgery.

Forgery: Opinions: Evidence: Jury-room inquest: Experts. Where the question is one to be determined mainly upon opinions belonging somewhat to the domain of expert evidence, like that of handwriting, it is not admissible to leave the matter to be settled by a jury-room inquest and inspection, in which the opinions of fellow jurymen, who may not be qualified to give an opinion at all, and whose qualifications are not investigated, may stand for more than the sworn testimony of the most careful and skillful expert.

Evidence: Handwriting: Comparison: Papers not in the cause. The rule confining the use of papers for the purpose of comparison of handwriting to such as belong in the cause, which was established for this state by *Vinton v. Peck*, 14 Mich., 287, is re-affirmed; the fact that an English statute since that decision allows the reception of such documents as are satisfactory to the court, does not destroy the force of the reasons for the rule before prevailing.

Heard April 11. Decided April 18.

Error to Oakland Circuit.

A. C. Baldwin and G. V. N. Lothrop, for plaintiffs in error (contestants and appellants), on the subject of the admissibility of photographic copies, cited: *Frank v. Chemical Bank*, 37 Sup. Court (N. Y.), 26; and that the refusal to require the original will to be taken to the jury room was error: *Howland v. Willets*, 5 Sandford, 219; S. C., 5 Seld., 174; *Porter v. Mount*, 45 Barb., 428; at the least it was discretionary to permit it, and the court exercised no discretion, but based

MATTER OF ALFRED FOSTER'S WILL.

his refusal on a want of power except by consent of both parties ; see *Hackley v. Hastey*, 3 Johns., 252 ; *Graham & Waterman on New Trials*, 76 ; *Hilliard on New Trials*, 174-6 ; and on the subject of the admissibility of undisputed signatures to documents not belonging to the cause, for the purpose of comparison of handwriting : *Vinton v. Peck*, 14 Mich., 287 ; *Doe v. Newton*, 5 Ad. & El., 514 ; *State v. Ward*, 39 Vt., 225 ; *Richardson v. Newcomb*, 21 Pick., 315 ; *Chandler v. Lebanon*, 45 Me., 536 ; *Lyon v. Lyman*, 9 Conn., 55 ; *Adams v. Field*, 21 Vt., 256 ; *Myers v. Tocsin*, 3 N. H., 47 ; *Bowman v. Sanborn*, 28 N. H., 97 ; *Guffey v. Deeds*, 29 Penn. St., 378 ; *Travis v. Brown*, 43 Penn., 17 ; *Robertson v. Miller*, 1 McMullen, 120 ; *Baker v. Mygatt*, 14 Iowa, 131.

M. E. Crofoot, for defendant in error (proponent), to the point that the original will being produced and being the best evidence, the introduction of the photographic copies, which are to be regarded as secondary evidence, is not competent, cited : 1 *Greenl. on Ev.*, p. 97, § 82, p. 197, § 116, and cases cited ; *People v. Lambert*, 5 Mich., 360 ; *Moulton v. Mason*, 21 Mich., 364 ; *Com. v. Eastman*, 1 Cush., 189 ; *Taylor Will Case*, 10 Abb., Pr., N. S., 301 ; *Tome v. Parkersburgh R. R.*, 39 Md., 36 ; and on the subject of admitting papers not belonging in the cause, for the purpose of a comparison of signatures : *Bromage v. Rice*, 7 C. & P., 548 ; *Waddington v. Cousins*, *Id.*, 595 ; *Doe v. Newton*, 5 Ad. & El., 514 ; *Hughes v. Rogers*, 8 M. & W., 123 ; *Griffits v. Ivery*, 11 Ad. & El., 323 ; *The Fitzwaller Peerage*, 10 Cl. & Fin., 193 ; *Van Wyck v. McIntosh*, 14 N. Y., 442 ; *Dubois v. Baker*, 30 N. Y., 355 ; *Randolph v. Laughton*, 48 N. Y., 456 ; *Morey v. Safe Dep. Co.*, 2 J. & Sp., 154 ; *Merchant's Will Case*, 1 Tuck., 151 ; *Hazellton v. Union Bank*, 32 Wis., 34 ; *Clark v. Rhodes*, 2 Heisk. (Tenn.), 206 ; *Vinton v. Peck*, 14 Mich., 287 ;

MATTER OF ALFRED FOSTER'S WILL.

Van Syckle v. People, 29 Mich., 65; *Medway v. U. S.*, 6 Court of Cl., 421; *Moore v. U. S.*, 13 Alb. L. J., 63; and on the subject of the jury taking to their room, without consent of parties, papers introduced in evidence: *Findley v. People*, 1 Mich., 237.

CAMPBELL, J:

Upon the appellate probate proceedings in the circuit court of Oakland county, certain rulings were made on the trial which are brought up by writ of error on the bill of exceptions. All relate to questions connected with the evidence used on the hearing.

The propounders of the will proved its execution by the two subscribing witnesses, whose testimony was direct and positive to all the requisites of a valid will.

Upon opening their proofs, the contestants proposed to furnish the jury with photographic copies of the will, which the court declined to permit.

A witness named Toms, who was called to testify concerning Foster's handwriting, having produced a note and mortgage which he asserted to have been signed by Foster, the court refused, upon application, to allow these papers to be used before the jury for purposes of comparison.

A second application was refused, which proposed to give the jury photographic copies for purposes of comparison.

Permission to have the jury take the original will to their room to compare its body with the signature was also refused, no application having been made by the jury, and the opposite counsel not assenting unless the jury desired to see it.

These were the bases of the assignments of error.

If the court had permitted photographic copies of the will to be given to the jury, with such precautions as to secure their identity and correctness, it might not perhaps have been error. Nevertheless it is not always true that every photographic copy would be safe on any inquiry requir-

MATTER OF ALFRED FOSTER'S WILL.

ing minute accuracy. Few copies can be so satisfactory as a good photograph, but all artists are not competent to make such pictures on a large scale, and all photographs are not absolutely faithful resemblances. It is quite possible to tamper with them, and an impression which is at all blurred would be very apt to mislead on questions of handwriting where forgery is claimed. Whether it would or would not be permissible to allow such documents to be used, their use can never be compulsory. The original, and not the copy, is what the jury must act upon, and no device can be properly allowed to supersede it. Copies of any kind are merely secondary evidence, and in this case they were intended to be used as equivalent to primary evidence in determining the genuineness of the primary document. That, and that only, was in controversy, and was in court to be shown to the jury. However fortunate it may be that copies can now be produced which will closely resemble originals, it would be an unauthorized assumption to hold that courts should be compelled to receive additional and supplementary proofs, which were neither necessary nor admissible before, and which are at best merely convenient aids to enable juries to dispense with the use of the primary evidence. Their rejection left the only paper before the jury with which they were at all concerned, and it was not error. The same remark will apply concerning the use of such copies during the examination of witnesses and the argument of counsel.

The refusal to require the original will to be taken to the jury room, when the jury had not desired it, was not contrary to law or practice. It has even been questioned whether it could properly be allowed at all, but this seems to be rather disfavored than absolutely erroneous. Much may be said on both sides of such a question. But the purpose avowed in this cause, of having the jury use the document to look for resemblances between the body and the signature for the purpose of inferring forgery, indicates some danger in permitting it. When a juror is to give

MATTER OF ALFRED FOSTER'S WILL.

testimony he must do it in open court. Yet practically this jury-room inquest would involve the expressions of opinions belonging somewhat to the domain of expert evidence, and having the force of facts, when if it were assumed the jury was competent to settle such matters by their own skill it might not be competent to examine witnesses upon it at all. Nothing can be more dangerous than to allow the suspicions and surmises of men whose opinions could not often be received as witnesses, to fix the rights of parties by their fanciful notions of resemblances or differences. In this country most jurors are not illiterate, but it would be very strange if the average members of juries could be regarded as qualified to form safe opinions on an inspection of papers upon nice points of identity in handwriting, especially when the whole case may depend upon their correctness. Juries can undoubtedly, and must, use their judgment more or less concerning documents laid before them, and have it in their power to rely on their own views very much if they see fit. But the law presumes they will act on testimony chiefly, if not entirely, and it would not be proper to assume that they all have equal knowledge or skill in such inquiries, or that when they consult together the opinions of one would not have more influence than those of another, when the opinions operate as facts in the cause. If a verdict were formed on statements of ordinary facts by one juror to his fellows, it would be a violation of their oaths. When opinions are such as to stand in the same light, the result cannot be much less dangerous.

No harm can usually result from the possession of documents in the jury room, because they seldom call for examinations of their genuineness, and are usually only important for their contents. When their genuineness is in controversy, and that is to be judged by resemblances and peculiarities on which witnesses have been examined as experts, their inspection alone may become one of the means of evidence requiring skill to deduce its results.

Every one knows how very unsafe it is to rely upon any

MATTER OF ALFRED FOSTER'S WILL.

one's opinions concerning the niceties of penmanship. The introduction of professional experts has only added to the mischief, instead of palliating it, and the results of litigation have shown that these are often the merest pretenders to knowledge, whose notions are pure speculation. Opinions are necessarily received, and may be valuable, but at best this kind of testimony is a necessary evil. Those who have had personal acquaintance with the handwriting of a person are not always reliable in their views, and single signatures, apart from some known surroundings, are not always recognized by the one who made them. Every degree of removal beyond personal knowledge, into the domain of what is sometimes called with great liberality scientific opinion, is a step towards greater uncertainty, and the science which is so generally diffused is of very moderate value. Subject to cross-examination it may be reduced to the minimum of danger. In a jury-room, without any check or corrective, it would be very dangerous indeed.

The question of allowing papers not otherwise in the case to be received and proved for purposes of comparison, was disposed of in *Vinton v. Peck*, 14 Mich. R., 287, and we have seen no reason to change our opinion. In the cases of the *Tracy and Fitzwalter Peerages*, in 10 Clark & Finnelly, 154 and 193, this subject was discussed somewhat, and the danger of allowing testimony of handwriting from studies made expressly for the occasion was forcibly expressed. Mr. Best regards it as absolutely incompetent, and it has been so regarded in some instances by the courts.—*Best on Evidence*, 236. The **Stirling Peerage Case* was a remarkable illustration of its quality. Such testimony is usually not only obtained for the occasion, but obtained under bias. It was held in *Vinton v. Peck*, that such testimony might be based on papers in the cause, although its value may not be very great. But

* A very good report of this remarkable case was published in Blackwood's Magazine, under the title of the "Romance of Forgery," and was afterwards included by the author (Samuel Warren, LL. D.) in his collected "Miscellanies." It is also reported in Townsend's Modern State Trials.

MATTER OF ALFRED FOSTER'S WILL.

when to the danger of hasty and perhaps biased opinions is added the disputed genuineness of papers produced, and the difficulty of producing all that might be of use for comparison on both sides, we cannot but think the risk is too great to justify the reception of such means of proof.

The fact that an English statute has allowed the reception of documents satisfactory to the court, is not an argument to which we can yield our own judgment. Some of the ablest judges in England, who were not in the least backward in legal reform, have always regarded the old rule as rather over-liberal than over-strict. What influences may have induced parliament to change the rule we do not know, but it certainly was not the opinion of those judges whose views have been most respected.

We think there is no error in the record, and the judgment must be affirmed, with costs.

The other Justices concurred.

Ward B. McArthur v. The Township of Duncan.

Townships: Highway commissioners' orders: Remedy: Mandamus. Mandamus, and not an action against the township, is the proper remedy to enforce payment of orders regularly drawn by the highway commissioners on the township treasurer: the duty of the township authorities to raise the necessary funds and to make payment, is just as imperative upon the presentation of such orders, as it would be after judgment against the township.

Submitted on briefs April 11. Decided April 18.

Error to Cheboygan Circuit.

Atkinson & Atkinson and Watts S. Humphrey, for plaintiff in error.

Trowbridge & Dowling, for defendant in error.

MCARTHUR v. TOWNSHIP OF DUNCAN.

GRAVES, J:

McArthur sued the township on certain orders drawn regularly by the highway commissioners on the township treasurer, who refused payment.

The court ruled that the action could not be maintained on the ground that mandamus was the proper remedy, and McArthur claims that this was error. That the liability of the township was fixed by the orders for the amount they represented, is not denied; but the objection urged by McArthur appears to be that mandamus might prove ineffectual inasmuch as that proceeding would fail in compelling payment in case there should be a lack of funds.

We do not see how a judgment would obviate the difficulty. The plaintiff in error would still be as far off from the collection of his claim as he is now. His demand would be swelled by costs and the judgment would not have the effect to put funds in the treasury and no execution could issue.—§ 6630, *C. L.* He would still be compelled to resort to *mandamus*, unless the township authorities should proceed to raise the necessary amount by taxation and make payment, and their duty to do this is just as imperative now as it would be if judgment were given against the township.

The point, we think, has been fully settled in this state as ruled by the circuit court, and we refer to the cases for a fuller explanation.—*Dayton v. Rounds*, 27 *Mich.*, 82; *Marathon v. Oregon*, 8 *Mich.*, 372, and other cases cited.

Judgment affirmed, with costs.

The other Justices concurred.

GRAND RAPIDS FURNITURE MANUFACTURING COMPANY v.
BURNHAM.

**The Grand Rapids Furniture Manufacturing Com-
pany v. Ira Y. Burnham.**

Corporations: Inquest. It is competent in a proper case to take an inquest under circuit court rule 99 against a corporation defendant, where no affidavit of merits has been filed.

Submitted on briefs April 11. Decided April 18.

Error to Kent Circuit.

Taggart, Simonds & Fletcher, for plaintiff in error.

G. Chase Godwin, for defendant in error.

COOLEY, CH. J :

The only question in this case is, whether a corporation defendant may have an inquest taken against it under circuit court rule 99, where no affidavit of merits has been filed. We have no doubt whatever that it may, and do not deem it necessary to discuss the point.

The judgment will be affirmed, with costs.

The other Justices concurred.

**John W. Howry and others v. Isaac Eppinger and
another.**

Promissory notes: "Secured by mortgage." Evidence: Copy: Variance.

An objection to the admission in evidence of the note sued upon, because it varied from the copy set out in the declaration, in that it contained the words "secured by mortgage," which did not appear in the copy, is held not well taken where it was accompanied by an admission of counsel that he was not misled by the omission.

HOWRY V. EPPINGER.

Promissory notes: Endorsements: Evidence. An objection to the introduction in evidence of the note in suit, because the endorsements were not proven, will not prevail where the payees have endorsed in blank, and are made defendants and fail to deny the execution; notes after such endorsement would pass by delivery, and it would not be necessary to prove subsequent endorsements.

Promissory notes: "Secured by mortgage:" Notice: Inquiry: Contents of mortgage. The words "secured by mortgage" written upon a promissory note form no part of the note, and do not operate to limit or impair its value; nor are they sufficient to notify third parties of the contents of the mortgage, or that it contained some clause inconsistent with the note, or to put them on inquiry. If it be the intent to limit the effect of the note by the terms or conditions of the mortgage securing its payment, language appropriate to express it must be employed.

Promissory notes: Mortgage security: Notice: Authority to sell: Bona fide purchaser. Where a note purporting to be secured by mortgage has been endorsed in blank by the payee and put into the hands of an agent to dispose of, the purchaser having notice of the contents of the mortgage, which showed that the mortgagee was a different person from the payee of the note or the seller, would not be bound thereby to surmise that such seller had obtained the note wrongfully and had no authority to part with it, nor would such notice be sufficient to put him on inquiry.

Promissory notes: Blank endorsement: Authority to sell: Notice: Instructions to agent. A purchaser of notes endorsed in blank from an agent with full authority to sell cannot be prejudiced by any violation by the agent of his instructions as to the manner of making the sale, or as to the disposition of the proceeds, where the purchaser had no notice of such instructions; beyond the apparent general right with which such agent is thereby clothed, third parties would not be bound to inquire.

Negotiable paper: Purchasers: Inquiry: Possible defenses: Notice. It is not the duty of parties about to purchase negotiable paper to make inquiries not required by good faith as to possible defenses of which they have no notice, either from any thing appearing on the face of the paper, or from facts communicated to them at the time.

Promissory notes: Bona fide purchaser: Equities of prior holders. Where an agent in possession of promissory notes endorsed in blank, with full authority to negotiate them, has turned them out as collateral to advances made and to be made to him, and has afterwards directed their sale, a bona fide purchaser would not be affected in any way by the state of the account between his vendor and such agent as to the advances.

Practice: New grounds of objection. New grounds of objection cannot be put forward in a court of review which were not distinctly made in the court below or fairly brought to the judge's attention.

Promissory notes: Bona fide purchaser: Dealings between firms having members in common: Notice. Where a firm have received, as collateral to advances, notes endorsed in blank, from an agent having authority to sell the same, and such agent afterwards instructs them to sell, another firm, one of whom is a member of both firms, may become bona fide purchasers of the paper and entitled to protection as such; there is nothing in such a connection between two firms that would necessarily preclude a sale in good faith from one to the other, where neither had notice of any thing wrong.

Heard April 12. Decided April 18.

Error to Saginaw Circuit.

HOWRY v. EPPINGER.

D. W. C. Gage, for plaintiffs in error.

Wisner & Draper, for defendants in error.

MARSTON, J:

Eppinger and Lehman brought action to recover the amount due upon a promissory note signed by the defendants Wiggins, and made payable to the order of defendant Howry. There were three other actions commenced by the same plaintiffs against the same defendants, upon similar notes given at the same time, except that one was signed by Howry and made payable to the order of defendants Wiggins. In all other respects the facts in each case were alike; they were therefore, under a stipulation between counsel, argued and submitted as one case.

These notes were secured by mortgage, and on the margin of each note was endorsed the words "secured by mortgage." Each was endorsed by the payee in blank, and also by Oliver P. Burt, who was also made defendant. The case was afterwards and before trial discontinued as to him, and his endorsement erased.

It also appeared that these notes were by Oliver P. Burt left with Eppinger, Russell & Co., as collateral security for advances before then and afterwards to be made by them to him; that upon the 3d of December following (1873), Burt, by letter, authorized Eppinger, Russell & Co. to negotiate and sell these notes; that upon the receipt of that letter and upon the 13th day of December, Eppinger, Russell & Co. sold these notes to the plaintiffs, for the full amount of them, less the usual discount, credited Oliver P. Burt with the proceeds, and rendered to him a statement of account showing the amount so credited, and to which he made no objection. Upon the 6th of April, 1874, Eppinger, Russell & Co. were notified by Willis Clary that he claimed to own the notes. It also appeared that the mortgage given to secure payment of these notes was executed some time

HOWRY V. EPPINGER.

after the execution of the notes, and after they had been left with Eppinger, Russell & Co. as collateral; that the mortgage was given to Willis Clary as mortgagee, and showed that these notes belonged to him. Plaintiffs claimed to be *bona fide* holders.

Several errors are alleged, which will be noticed in their order so far as deemed material.

First. When the notes were offered in evidence it was objected that they varied from the copy set out in the declaration, in that the words "secured by mortgage" did not appear in the copy. The object in requiring a copy to be set forth in the declaration was for the benefit of the defendant so that he might be prepared to meet the plaintiff's claim. Counsel for defendants admitted at the time he made the objection, that he was not misled by the omission, but insisted upon his legal right to have a perfect copy. We think the defendants have no just cause of complaint, so long as they were fully apprised of the plaintiff's claim, and were not misled in any way or surprised by reason of the omission. They could not insist that every thing appearing upon the face of the notes, either in the shape of embellishments or otherwise, should appear in the copy given. These words were really no part of the note, and it was not necessary that they should appear in the copy given.

Second. Another objection made to the introduction of the notes was, that the endorsements were not proven. The payees had endorsed the notes in blank; they were defendants and did not deny the execution. The notes, after such endorsement, would pass by delivery, and it would not be necessary to prove subsequent endorsements. We see no error in this ruling. This covers the first two objections as noticed in the brief.

Third. That the court erred in not charging the jury in compliance with the third, fourth and fifth of defendants' requests, which in effect were, that the words "secured by mortgage" formed a part of the notes, and were notice to Eppinger, Russell & Co. of the contents of the mortgage,

HOWRY v. EPPINGER.

that it was given to Willis Clary, to whom the notes belonged, or that it was at least sufficient to put them upon inquiry, and that if they failed to make such inquiry, then plaintiffs, in either event, could not recover.

As we have already said, the words "secured by mortgage" formed no part of the notes. The object and intent of the parties in putting these words upon the notes was not to limit or impair their value, but to add to it. It was not to notify third parties that the mortgage contained some clause inconsistent with the notes, and which would destroy or affect their negotiable character. One object undoubtedly was, to show they were the notes referred to in the mortgage and thus connect them. But the principal one was, to show that in addition to the responsibility of the makers they were also secured by mortgage. If the makers intended to limit the effect of the notes by the terms or conditions of the mortgage securing their payment, they should have done so by language which could admit of no doubt as to its intent and meaning. We think these words were neither sufficient to inform third parties of the contents or terms of the mortgage, or to put them upon inquiry. If, however, we should hold that these words were sufficient to put Eppinger, Russell & Co. upon inquiry, or even inform them of the contents of the mortgage, still these defendants would not be benefited thereby, as there was nothing in the mortgage, even had it then been in existence, tending in any way to impair their value or render them non-negotiable.

It is true the mortgage would have shown that Willis Clary had owned and was at one time entitled to these notes. They had, however, been made payable to the order of J. W. Howry (and defendants Wiggins), and by them endorsed in blank. It also appeared that at or shortly after the execution and delivery of these notes to Clary, he placed them in the hands of Edwin Burt with directions to negotiate them; that upon the suggestion of Oliver P. Burt they were left

HOWRY v. EPPINGER.

with Eppinger, Russell & Co., and afterwards by them negotiated as before stated.

It would seem to be clear, therefore, that even if Eppinger, Russell & Co. should have had actual knowledge of the contents of the mortgage, yet that nothing was contained therein suggesting any defense to the notes, or showing that Burt was not at the time these notes were deposited and negotiated the owner thereof, or that he did not have full power to negotiate them.

It is equally clear from the defendant's own showing, that Clary had clothed Edwin Burt with full authority to negotiate these notes, and that if he exceeded his authority or instructions in any way, it was in not negotiating them in the manner pointed out by Clary, and in not afterwards accounting to Clary for the proceeds. Of this, however, Eppinger, Russell & Co. had no notice; and a violation by Burt of his instruction in these respects could not affect them. Clary had given him the right to negotiate them, and had placed in his hands the notes endorsed in blank. Beyond the apparent general right which Burt thus had, third parties in this case were not bound to inquire.

These requests were, however, erroneous in another respect. They requested the court to charge, that because of these words appearing upon the notes, Eppinger, Russell & Co. should have made inquiry as to the mortgage and its contents; failing to do so, they are chargeable with notice of the contents of the mortgage, and are not, therefore, *bona fide* holders.

It is not the duty of parties about to purchase negotiable paper to make inquiries as to possible defenses, unless either from something appearing upon the face of the paper, or from facts communicated to them at the time, they could not honestly purchase without making further inquiry; in other words, that they acted in bad faith.—*Miller v. Finley*, 26 Mich., 254.

Fourth. That the court erred in not charging the jury,

HOWRY v. EPPINGER.

that if Burt had paid the advances in full to Eppinger, Russell & Co. which they made, then plaintiffs could not recover; and if not paid in full, then plaintiffs could only recover the amount unpaid, and that the plaintiffs' right of recovery was no better than Eppinger, Russell & Co., as requested by defendants in their sixth, seventh and eighth requests to charge.

If Eppinger, Russell & Co. were the owners of the notes at the time suit was commenced, then clearly plaintiffs could not recover whether the advances made had been repaid or not. Plaintiffs claimed to have purchased these notes from Eppinger, Russell & Co., as before stated, and to be *bona fide* holders. This question, as to whether they had purchased in good faith, for a valuable consideration at the time stated, was by the court distinctly submitted to the jury, and they were instructed that unless they so found, then plaintiffs could not recover. Under the theory upon which the plaintiffs claimed to recover, and the charge of the court upon this branch of the case, it was wholly immaterial whether the advances made by Eppinger, Russell & Co. to Burt had been by the latter repaid to them.

Counsel under this head also claimed that as Eppinger was a member of the firm of Eppinger, Russell & Co., and also of the firm of Eppinger & Lehman, the sale of these notes by the former to the latter firm was void, upon the principle that an agent whose duty it is to sell cannot become the purchaser.

We doubt whether this particular objection was raised in the court below. The requests to charge are undoubtedly broad enough to raise this question; but in the court below they were placed upon other grounds, and this particular one was not mentioned, and it is one that might not readily occur to the court. Under such circumstances justice to the judge before whom the cause was tried requires the particular objection to be pointed out. And counsel also should be informed of the objections intended to be covered by a request, else it serves as a mere trap and no good can result

HOWRY v. EPPINGER.

from such a course. We do not, however, see any objection to the transfer made upon this ground. If Eppinger, previous to the transfer, had received such knowledge that he or the firm of Eppinger, Russell & Co. could not have become *bona fide* holders of this paper, there might be reasons for holding that the firm of Eppinger & Lehman would be chargeable with such knowledge. If Eppinger was aware of no defect in Burt's authority to sell the paper, there was nothing to prevent him and his associates buying it. And if Burt assented to the sale to these plaintiffs, as it clearly appeared he did, the question now made is not in the case, as these defendants are in no position to raise this question.

The court properly excluded the letters of August 17th to O. P. Burt, as they had no connection with this matter.

We do not find any error in the record. The judgment must be affirmed in each case, with costs.

The other Justices concurred.

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The Detroit Sharpshooters' Association v. The Highway Commissioners of Hamtramck.

Condemning lands: *Statute to be strictly followed.* In all cases where the property of individuals is sought to be condemned for the public use by adverse proceedings, the statute must be strictly followed, and especially must every jurisdictional step, and every requirement shaped to guard the rights and interests of parties whose property is meant to be taken, be precisely observed.

Highways: Commissioners: Notice of meeting: Application: Jurisdiction. The law requiring highway commissioners, in proceedings to lay out a highway, to issue their notice for convening the board within five days after the receipt of the application of the freeholders, a delay of more than a month in taking this step is fatal to their power to proceed on the basis of such application.

Laying out highways: Notice: Proof of service. A written statement by one of the commissioners without date, of the service of notice on owners and occupants, which contains no description of the notice or any date in regard to the time of service, is not sufficient proof of service of the statutory notice required in such proceedings. Regularly there should

DETROIT SHARPSHOOTERS' ASSOCIATION v. HIGHWAY COMMISSIONERS OF HAMTRAMCK.

be sworn evidence in writing of the service, made and filed with the board.

Submitted on briefs April 12. Decided April 18.

Certiorari to Highway Commissioners of Hamtramck.

Otto Kirchner, for relator.

No counsel appeared for respondents.

GRAVES, J :

On January 22d, 1875, application was made to respondents to lay out a highway in the township, to commence "at Gratiot road, private claims Nos. 10 and 152, to the front concession, thence east on front concession, to a line that leads to Mack street between Nos. 10 and 152;" and they waited until the 20th day of the succeeding March, and then issued their written notice of the object of the application, and of the time and place of meeting by the board for the purpose of deciding upon the necessity of laying out the highway asked for, and the appraisal of damages. The time fixed by the notice was the 24th of March. At that time the board met and made an order that they considered and determined that a public highway should be laid out pursuant to the application, and the order described the line of the intended way and set forth an appraisal of damages. The only evidence of service of notice on owners and occupants which seems to have been made, was a written statement by one of the commissioners, without date.

And this statement contained no description of the notice, or any date in regard to the time of service. No other proof of service is returned. The relator having brought up the proceedings by *certiorari*, now pray that they may be quashed.

The rule is well settled, that in all cases where the property of individuals is sought to be condemned for the public use by adverse proceedings, the laws which regulate such proceedings must be strictly followed, and especially that every jurisdictional step, and every requirement shaped to

DETROIT SHARPSHOOTERS' ASSOCIATION v. HIGHWAY COMMISSIONERS OF HAMTRAMCK.

guard the rights and interests of parties whose property is meant to be taken, must be observed with much exactness.

Such has not been done here. The law required the commissioners to issue their notice for convening the board within five days after the receipt of the application of the freeholders.—§ 1253, *C. L.* They delayed, however, for more than a month. This was fatal to their power to proceed on the basis of the application. If they could defer issuing the notice for a month after the application, without impairing their right to go on, they could equally defer it for six or twelve months, and thus defeat the plain sense as well as terms of the statute. There are many cases where courts of justice lose jurisdiction on account of failing to take one step within some specified time after another, and the reason for it can never be clearer than in matters like this.

Another difficulty in this proceeding is, that no evidence has been furnished that any notice whatever was served on owners and occupants in due season. The law is positive that it shall be given "at least ten days before the time of meeting."—§ 1253, *C. L.* This is very important. Before proceeding to make determination, the commissioners should have been apprised in writing that the notice issued had been served regularly. Because if legal service had not been made, the commissioners were without power to go on and pass upon the application and make appraisal. The law contemplates a hearing on due notice, and not an *ex parte* proceeding. Regularly I should say sworn evidence of service should be made in writing and filed with the board. Where parties actually appear and raise no objection on the score of want of due notice, the case may be different.

There are some other objections to these proceedings, but I do not consider them.

The proceedings must be quashed.

The other Justices concurred.

BRABON v. PIERCE.

Arthur L. Brabon and another v. Daniel Pierce.

Replevin bond in justice's court: Appeal: Costs. The condition of a replevin bond in justice's court is not satisfied by a return of the property, on a judgment in that court for defendant, and payment of the justice's costs, in a case where the plaintiff afterwards appeals, but it remains in force until the final disposition of the case, and it includes costs recovered by the defendant in the circuit on such appeal.

Justice's courts: Replevin bond: Appeal bond: Cumulative remedy. The appeal bond given by the plaintiff, on his appeal of a replevin suit in justice's court, is a cumulative remedy in favor of the defendant, but it does not supersede or take the place of the replevin bond given on the institution of the suit.

Submitted on briefs April 12. Decided April 18.

Error to Allegan Circuit.

Jacob V. Rogers, for plaintiffs in error.

Stafford & Tomlinson, for defendant in error.

COOLEY, CH. J:

The action in the court below was debt upon a replevin bond given on the institution of a suit before a justice of the peace. The defendant succeeded in that suit and obtained a return of the property. The plaintiff appealed, paying to the justice the costs of the suit before him. In the circuit court the defendant again succeeded, obtaining a judgment for costs. It is to recover these costs that the present suit is brought.

The defendants in this suit in the court below insisted that when the property had been returned and the costs in the suit before the justice had been paid, the condition of the replevin bond had been performed, and that the further remedy of the defendant in the replevin suit must be found in enforcing the bond which the plaintiff was compelled to give in perfecting his appeal. We think this position un-

BRABON v. PIERCE.

tenable. The condition of the replevin bond was, "that the plaintiff will prosecute the suit to effect, and that if the defendant recover judgment against him in the action he will return the same property, if return thereof be adjudged, and will pay the defendant all such sums of money as may be recovered by such defendant against him in the said action."—*Comp. L.*, § 6735. Now it is manifest that the force of this condition is not spent when the case is disposed of in the justice's court. The plaintiff does not prosecute his suit to effect unless he finally recovers; and as the action after appeal is still the same action that was in the justice's court (*Dunn v. Sutliff*, 1 Mich., 24), the costs awarded by the circuit court are clearly within the condition.—*Bennett v. Brown*, 20 N. Y., 99; *Robinson v. Plimpton*, 25 N. Y., 484. The appeal bond or recognizance, when the plaintiff appeals, gives the defendant a cumulative remedy, but not in all cases an adequate remedy. The penalty under the statute where no recovery of damages had been had before the justice, might be fifty dollars only.—*Comp. L.* 1871, § 5433. And this would be wholly inadequate in a case of replevin, in which, exclusive of costs, the recovery might much exceed that sum.

This is the only error assigned on this record which we deem it important to examine in this opinion. Several are assigned without the facts being sufficiently stated to enable us to pass upon them; all the others are manifestly untenable.

The judgment must be affirmed, with costs.

The other Justices concurred.

The John Hancock Mutual Life Insurance Company v. James Moore.

Evidence: Admissions: Record evidence. A party can never be compelled against his will to accept his adversary's admission in lieu of record evidence.

Evidence: Documents: Purposes. A paper which is admissible in evidence for one purpose does not become inadmissible because it cannot be used for another.

Life insurance: Administrator: Letters: Plaintiff's capacity: Evidence. In an action by an administrator upon a life insurance policy, the letters of administration are admissible in evidence to show the plaintiff's capacity, and they cannot be excluded on the objection that they are no evidence of death.

Life insurance: Proofs of death: Admission: Documentary evidence. An admission that proofs of death had been furnished to the company, will not preclude the introduction of the documentary evidence.

Death: Circumstantial evidence. In civil cases death, like any other fact, may be proved by circumstantial evidence, and it is not necessary to produce an eye witness to the act.

Life insurance: Evidence: Insanity. Evidence tending to show that one who had disappeared had been for a considerable time laboring under a severe and dangerous disease of the brain and spine, which in the opinion of his physician must have proved fatal in a short time and must probably have rendered him insane, with evidence of its effect on his feelings and conduct, indicating that his mind was affected by the disease, is sufficient to warrant the submission of the question of his sanity, in a case where it was material, to the jury as one of fact.

Evidence: Death: Disappearance: Search. A sudden disappearance and the failure after search to discover any traces of a man who if living could not easily have gone unnoticed, and who was in such a physical and mental condition as to excite the anxiety of his friends, cannot be said to afford no evidence tending to prove his death, or to authorize an instruction to the jury to that effect.

Life insurance: Policy: Conditions: Self-killing: Penalty: Forfeiture: Burden of proof. In an action upon a life policy, a condition in the policy making it void in case the person whose life is insured die by his own hand, is to be construed as in the nature of a penalty or forfeiture, and the burden is on the insurers to show it, and not on the insured to negative it.

Suicide: Definition: Self-murder. The term "suicide" means self-killing, just as homicide means killing another; and it cannot be restricted in meaning to apply only to a wrongful act or self-murder.

Life insurance: Policy: Self-killing: Classed with wrongful acts: Construction. The act of self-killing as a cause of forfeiture being classed in the policy among others involving such wrongful conduct as death by duelling, by the hands of justice, or in the violation of the laws, or impairing health by vice or intemperance, it is to be inferred that it is regarded as *ejusdem generis* and depending on the same reasons.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO. v. MOORE.

Life insurance: Policy: Self-killing: Condition: Forfeiture: Insanity. Such a condition cannot be construed to cause a forfeiture for acts involving no evil will, such as self-slaughter by an insane person.

Life insurance: Insanity: Disease. The very object of life insurance is to provide for death by disease or in the ordinary course of nature; and death by his own hands, in the case of one *non compos*, is as much the result of disease as death by fever or consumption.

Life insurance: Special finding: Suicide: General verdict. In an action upon a life policy containing such a condition, a special finding of suicide, without a further finding that it was voluntary, would not conflict with a general verdict against the insurers; and the failure of the jury to answer the special question, whether the person whose life was insured committed suicide, will not vitiate or overturn the verdict.

Heard April 12. Decided April 18.

Error to Wayne Circuit.

Griffin & Dickinson, for plaintiff in error.

Albert H. Wilkinson and *Hoyt Post*, for defendant in error.

CAMPBELL, J:

The suit below was on a life policy in favor of William Todd, who was claimed to be dead, but whose death was sought to be proved by his disappearance, aided by circumstantial testimony.

The defense relied on was, *first*, that he was not shown to be dead, and *second*, that if dead he died by his own act. The policy contained this clause: "3. That in case the person whose life is hereby insured shall die by his own hand," &c., &c., &c., "this policy shall be void, and the company shall not be liable for the loss."

An error is alleged on the reception in evidence of the letters of administration. Defendants below admitted their existence and the representative character of Mr. Moore, but objected to the admission of the letters themselves, because they were not evidence of the death of Todd. The court held they were not evidence of death, but admitted them in proof.

We do not quite comprehend the objection. A party

JOHN HANCOCK MUTUAL LIFE INSURANCE CO. v. MOORE.

can never be compelled to accept his adversary's admission in lieu of record evidence unless he chooses, and a paper which is admissible for one purpose does not become inadmissible because it cannot be used for another. The letters were proper to show the plaintiff's capacity, and could not be excluded on any theory. Whether they proved death, was another matter, and in this case the court held they did not.

The same remark will apply to the proofs of death submitted to the company under the requirements of the policy. The admission that such proofs had been furnished did not render it improper to produce the documentary evidence and thus prevent any subsequent disputes as to the meaning and extent of admissions.

And it would be difficult to see how a party can be damaged by proof which accords with his admissions.

The principal questions arise upon the rulings in the cause as it went to the jury.

The defendant below's first request was as follows: "That under the law there is no presumption of death until after a disappearance of seven years, and that the burden of proof is upon the plaintiff in this case to show the fact of death; that it is not incumbent upon the insurance company to show that the insured is not dead, until after the lapse of seven years from date of disappearance."

This the court gave; but stated to the jury in substance, that death might be shown otherwise than by the production of an eye-witness to the act, and might be shown by satisfactory circumstances.

This was unquestionably correct. There is no doctrine which in civil cases requires death to be proved by any more conclusive or peculiar evidence than any other fact material to recovery in an action. If the testimony satisfies the court or jury passing on the facts, and is reasonably sufficient, and compels belief, the conclusion is certainly lawful.

Upon the rulings of the court upon the second, third and fourth requests of defendant below, no exception was

JOHN HANCOCK MUTUAL LIFE INSURANCE CO. v. MOORE.

taken. They were substantially granted, and related to the necessity of diligent search and inquiry after the missing man, and the question of suicide and the presumption of insanity.

Three requests were refused, which were: 5. That there was no evidence of Todd's insanity at the time of his disappearance; 6. That there was no evidence of his death; and 7. That under the evidence plaintiff could not recover.

The evidence tended to show that Todd had been for a considerable time laboring under a very severe and dangerous disease of the brain and spine, which in the opinion of his physician must have proved fatal in a short time, and must probably have rendered him insane. There was evidence of its effect on his feelings and conduct, indicating that his mind was affected by the disease. The testimony was such as to have a decided bearing on the question of his sanity, and it was for the jury to pass upon it. It is not for us to review their finding, if there was evidence before them to be acted on. We have no means of knowing what they thought of it, as they have not found specially on the subject.

As to the fact of death, we think there was not only competent evidence, but such as they were fully justified in accepting as complete. A sudden disappearance, and the failure to discover any traces of a man who if living could not easily have gone unnoticed, and who was in such a physical and mental condition as to excite the anxiety of his friends upon this very subject, cannot be said to afford no evidence tending to prove his death. The instructions of the court as to the diligence needed for a search after him, were full and correct. The assiduity of friends in pursuing the inquiry was great and constant. We think the jury had enough to act upon.

They found a general verdict for the plaintiff. They were asked to find whether Todd committed suicide, and answered they could not say. It is claimed this vitiated their verdict.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO. v. MOORE.

Plaintiff in error insists that the burden of proof is on the administrator to prove that Todd did not die by his own hand, and also, that if he did so, the policy is void, whether he was sane or insane.

The condition which makes the policy void in case of such a death, is in the nature of a penalty or forfeiture, and the burden is on the insurers to show it, and not on the insured to negative it. There can be no presumption of wrong-doing without proof, and the insured is not bound to show that his intestate had done no act to destroy an existing right in the policy. This would be to reverse the burden of proof generally adopted. Usually where the death is not proved by eye-witnesses the circumstances are such that the order of proof becomes less material, and the facts connected with the death may be so peculiar as to need explaining. Of course if the plaintiff suing upon a policy throws doubt over his own case, or if his witnesses by their examination and cross-examination leave his case imperfect, he must clear it up or be defeated. But when all the testimony on both sides is in, any inference which will lead to a forfeiture can only be properly drawn from a preponderance of proof that the forfeiture has been incurred.

The forfeiture in this case was to arise if the insured died by his own hand. Some stress is laid on the term "suicide," as if it means a wrongful act or self-murder. It has no such restricted meaning. It means self-killing, just as "homicide" means killing any one else. But there may be excusable homicide as well as felonious, and suicide was only cognizable at law when the person was *felo de se*, or guilty of a felonious act. If *non compos mentis*, the actor in homicide or suicide commits no crime. In one sense the man dies by his own hands who kills himself, whether sound or frenzied. But the condition in this policy cannot be construed to cause a forfeiture for acts involving no evil will. The clause punishing the insured for self-slaughter is a penal clause in the strictest sense of the term, and embraces several other acts in the same penalty, all of

JOHN HANCOCK MUTUAL LIFE INSURANCE CO. v. MOORE.

which involve voluntary wrong-doing. They are death by duelling, or by the hands of justice, or in the violation of the laws, or impairing health by vice or intemperance. When an act which is to cause forfeiture is classed among such wrongful conduct it is fairly to be inferred that it is regarded as *ejusdem generis*, and depending on the same reasons.

A construction which punishes a person who is not in fault is not to be favored, if it can be allowed at all. The very object of life insurance is to provide for death by disease or in the ordinary course of nature. Death by his own hands, in the case of one *non compos*, is as much the result of disease as death by fever or consumption. The act of an insane man is morally no more his act than if it were mechanical.

We do not think it profitable to discuss the subject at large. The authorities differ somewhat, but we do not think there is any such preponderance of good sense in those decisions which treat an insane person like one in his senses, that we care to follow them.

A finding of suicide, without a further finding that it was voluntary, would not conflict with the general verdict, and would be immaterial.

There is no error in the judgment, and it must be affirmed, with costs.

The other Justices concurred.

The Attorney General v. The Board of Supervisors of Bay County.

Taxes: Loans: Public uses: Application: Supervision. Taxes and loans, when authorized to be raised by any public body, must be raised under the implied condition that they are to be applied to the public uses under

ATTORNEY GENERAL V. SUPERVISORS OF BAY COUNTY.

the control or care of that body. They cannot be raised for the purposes or uses of others, unless such a power is plainly given, and such a power cannot be given for all purposes.

Highways: Supervisors: Loans: Expenditures: Discretion. Highways and roads are by the constitution put under the control of the boards of supervisors, not absolutely, but under legal restrictions, and those restrictions have confined them to state and territorial roads; and they can have no occasion to raise money for other roads, and they must exercise their own judgment in expending such moneys as they may lawfully raise.

Board of supervisors: Loans: Township purposes. A resolution of a board of supervisors providing for raising money to be paid over to the towns without any definition of purposes, and to be spent under the direction of a town officer, is held to be unauthorized and void.

Heard April 12. Decided April 18.

Appeal in Chancery from Bay Circuit.

Andrew J. Smith, Attorney General, and Hatch & Cooley,
for complainant.

T. F. Shepard and G. M. Wilson, for defendants.

CAMPBELL, J :

The bill was filed to prevent the issue of bonds for a loan of eighteen thousand dollars voted by the board of supervisors of Bay county, and claimed to be ratified by popular vote.

The resolution was, "that eighteen thousand dollars be appropriated for roads and bridges in Bay county, and that the same be apportioned to the towns as follows, viz. : three thousand five hundred dollars to the town of Monitor, three thousand dollars of which shall be expended on the Midland and Bay City road, and five hundred dollars to be expended on the section line road leading west from the Salzburg bridge in the town of Monitor; three thousand dollars to the town of Hampton, to be expended on the state road leading east from Bay City in the town of Hampton;" and one thousand dollars each to twelve other towns, "the several appropriations to be expended under the supervision of the supervisors of the townships to which appropriated."

ATTORNEY GENERAL V. SUPERVISORS OF BAY COUNTY.

A second resolution provided for the raising of the loan in question.

It is now claimed that this resolution does not comply with the law; that the board of supervisors can only raise such loans beyond one thousand dollars for such highways and bridges as are under their direction, and that none but state and territorial roads come within their control.—*C. L.*, § 491.

On the other hand, it is claimed their power is plenary under the constitution.

Article ten of the constitution declares, by § 6, "A board of supervisors, consisting of one from each organized township, shall be established in each county, with such powers as shall be prescribed by law."

"Section 9. The board of supervisors of any county may borrow or raise by tax one thousand dollars for constructing or repairing public buildings, highways or bridges; but no greater sum shall be borrowed or raised by tax for such purpose in any one year, unless authorized by a majority of the electors of such county voting thereon."

"Section 11. The board of supervisors of each organized county may provide for laying out highways, constructing bridges, and organizing townships, under such restrictions and limitations as shall be prescribed by law."

Taxes and loans, when authorized to be raised by any public body, must be raised under the implied condition that they are to be applied to the public uses under the control or care of that body. They cannot be raised for the purposes or uses of others, unless such a power is plainly given, and such a power cannot be given for all purposes.

The highways and roads are put under their control by the constitution, not absolutely, but under legal restrictions. Those legal restrictions have confined them to state and territorial roads. Other roads are put under other officers, to avoid a clashing of jurisdictions. The county board can have no occasion to raise money for other than its own

ATTORNEY GENERAL v. SUPERVISORS OF BAY COUNTY.

roads, and must exercise its own judgment in expending it. The resolution in question provided for raising money to be paid over to the towns, without any definition of purposes, and to be spent under the direction of a town officer.

We think this was a plain violation of law. The powers of the board are not independent of legislation, and the law only allows them to raise moneys for necessary uses.—*C. L.*, § 477. Any loan which they raise must be for some “of the purposes mentioned” in the statute.

The decree below should be affirmed, with costs.

COOLEY, CH. J., and GRAVES, J., concurred.

MARSTON, J., did not sit in this case.

James C. McDiarmid v. Oliver Caruthers and another.

Trespass: Declaration: Distinct acts: Election. Where a declaration in trespass is not for a continuing trespass begun at one time and continued up to another, but for a series of distinct acts of trespass, the first being laid on or about a specified day and the others at divers other times, it is competent for the court to put the plaintiff to his election by confining him to proof of either a single act prior to the date specified, or of so many as the truth allowed between that date and the commencement of suit.

Trespass: Election: Rulings that do not prejudice. Where under a declaration in trespass charging a series of distinct acts of which the first is laid on or about a specified day, the court at the outset has ruled that plaintiff must elect between a single act prior to the date specified, and so many as his proofs would warrant afterwards, and he has accordingly elected the latter, and offered no proof of the former, and it in no wise appears that he was in a situation to offer any, the ruling, if abstractly incorrect, is not shown to be prejudicial.

Submitted on briefs April 12. Decided April 18.

Error to Allegan Circuit.

Jacob V. Rogers, for plaintiff in error.

Stafford & Tomlinson, for defendants in error.

McDIARMID v. CARUTHERS.

GRAVES, J:

McDiarmid sued for trespass on lands. The action seems to have been commenced about September 1, 1874, and the declaration was filed on the fifth of that month. It alleged "that the defendants on or about the nineteenth day of August, 1874, and at divers other times during the year 1874, with force and arms, entered the close of the said plaintiff," etc. The defendants were acquitted by the jury, and the plaintiff complains that evidence offered by him was improperly excluded. The ruling occurred in this way: When the case was opened the plaintiff took the stand and after a few preliminary statements he swore that he saw the defendants on the land in question a great many times in 1874. His counsel then asked him at what particular time in 1874 he saw defendants upon that land, upon which defendants' counsel objected that the question was too general, and the claim in the declaration was read. The court decided that plaintiff was entitled to prove one act of trespass and no more before the 19th of August, 1874, or a trespass or as many trespasses as the truth allowed between the 19th of August, 1874, and the commencement of the suit, and in case of proof of a distinct act of trespass before the 19th of August, 1874, no other could be proved between that date and the commencement of suit. The plaintiff excepted, but proceeded to give evidence tending to show trespasses between the 19th of August and the commencement of suit. He made no offer of proof of a trespass earlier, and it does not appear that he was in a situation to make any. If, then, the ruling was not abstractly correct, we discover no ground for saying that the plaintiff was prejudiced by it. We may go further, however. The charge in the declaration was not for a continuing trespass begun at one time and continued up to another, but for a series of distinct acts of trespass, the first being laid on or about the 19th day of August, 1874. The court was therefore right in putting the plaintiff to his election and in requiring him to

MCDIARMID v. CARUTHERS.

adopt one of the two courses suggested in making proof of his cause of action.—*Gilbert v. Kennedy*, 22 Mich., 5. This disposes of the case.

The judgment should be affirmed, with costs.

The other Justices concurred.

Bletcher Creasey and others v. The St. George's Society of Detroit.

Equity pleading and practice: Demurrer overruled: Decree: Leave to answer.

A decree entered immediately upon the overruling of a demurrer to the bill is premature and irregular; the proper practice in such case is to grant defendant leave to answer, and upon his failure within the time granted to answer, then to enter final decree.

Decree: Case made by bill. The bill being so uncertain and indefinite as to be demurrable on that ground, and the decree being broader than was warranted by the bill, a reversal is ordered, and the record remanded for further proceedings.

Heard April 12. Decided April 18.

Appeal in Chancery from Superior Court of Detroit.

This was a bill filed by three members of the defendant association, to enjoin such association from carrying out certain provisions of a new constitution, and of certain by-laws supplementary thereto, adopted by said society after it had been in existence for a considerable period, and which are alleged to be in violation of the statute (*S. L. 1871, p. 209*) under which the society was incorporated, and to constitute an unwarranted departure from the previous course of action of the society. A general demurrer to the bill was interposed and overruled, and thereupon a final decree passed for the complainants, and defendant appealed.

Ward & Palmer, for complainants.

Walker & Kent, for defendant.

CREASEY v. ST. GEORGE'S SOCIETY OF DETROIT.

MARSTON, J:

The proceedings in this cause were somewhat irregular. The decree was premature. The demurrer having been overruled, the defendant should have had leave to answer; failing in this, then a final decree might have been granted.

The decree is also objectionable in that it is too broad and not warranted by the bill, which is uncertain and indefinite. A demurrer to the bill for uncertainty would have been sustained. It is very evident that as the case now stands no proper relief can be granted.

The decree must be reversed, with costs, and the record remanded for further proceedings.

The other Justices concurred.

Oliver P. Barber v. The City of Saginaw.

Charter of Saginaw City: Director of the poor: Employment of physician: Surgical operation. The director of the poor under the charter of Saginaw City (whose powers, duties and liabilities are by express reference limited to those of like officers in townships) has no authority to bind the city by the employment of a physician to perform a surgical operation upon a pauper of the city at an agreed price of fifty dollars.

Heard April 13. Decided April 18

Error to Saginaw Circuit.

N. S. Wood, for plaintiff in error.

D. P. Foote, for defendant in error.

GRAVES, J:

The plaintiff in error performed a surgical operation on a pauper of the city at the request of the director of the

BARBER V. SAGINAW CITY.

poor, and when the director made the request it was agreed between him and the plaintiff in error that the city should pay the plaintiff in error for his service the sum of fifty dollars. The city denied the authority of the director to impose the liability, there being at the time another person holding the position of physician for the city under resolution of the common council and a special agreement between that person and the city. Doctor Barber having sued the city to recover on the employment and agreement of the director, the city set up the want of power in the director, and the court sustained the point and gave judgment for the city. We are now asked to reverse this ruling on writ of error. There is doubt whether the duties resting on the city physician would include a service like that rendered by the plaintiff in error, and I do not think it necessary to decide whether they would or not; because if they would not, it would not follow that the director would have discretionary authority to employ such surgical aid for paupers as he might consider proper at the expense of the city.

The charter confers power on the common council to appoint a director of the poor (§ 8), to prescribe his powers and duties (*subdivision 28*, § 10), subject to the provisions of the charter, to enlarge his "rights, powers, duties and liabilities," so far as consistency with the charter will permit (§ 56); and by § 22 declares that he shall perform the like duties, and in the same manner, and be subject to the same liabilities as directors of the poor in townships, except as otherwise provided for in the charter or by ordinance of the common council; and the only ordinance relating to his power is one passed May 13, 1857, which declares that directors of the poor of the "city of Saginaw City" shall perform in and for said "city of Saginaw City" like duties to those required to be performed by "directors of the poor in townships," except as otherwise provided by the "act to incorporate the city of Saginaw city," "and as may be provided by the by-laws and ordinances of the common council." From this summary it will appear that the

BARBER v. SAGINAW CITY.

director of the poor is an appointee of the common council, and that the powers belonging to township directors are referred to as measuring his in case the council makes no change, and that in fact none have been made. On turning to the general laws relating to township directors there is a great deal of obscurity; but it is plain after all that there has never been any regulation which permitted those officers to incur any such liability on behalf of their townships as that sought to be enforced here, or any liability at all except for small amounts and to meet pressing temporary needs.—*Ch. 2, Pt. 1, Tit. 9, R. S. 1838; ch. 38, R. S. 1846; ch. 40, C. L. 1857; ch. 50, C. L. 1871; and* we see nothing in the charter indicating a purpose to allow the director appointed by the council to bind the city where a township director could not bind his township, independently of some regular manifestation of approval by the council. On the contrary, the charter provisions are particular in their requirements that the common council shall have control in regard to compensations to be made by the city and charges to be brought against it (§ 57, § 10), and also in relation to the auditing and adjusting of claims.

The right to charge the city on account of such employments and services as the plaintiff in error relies upon in this case, should be supported by some clear warrant of authority from the common council, or some act of ratification. If the power was inherent in the office of director his act would bind without any thing further. But it is not. The law has vested in the council the right to create such liabilities, and the city cannot be bound unless through the action of that body by ordinance, resolution or otherwise.

The ruling of the court below on this point was correct, and as a consequence the plaintiff was not entitled to recover, and the judgment should be affirmed, with costs.

The other Justices concurred.

CRIPPEN v. HOPE.

Warren S. Crippen v. Edward Hope.

Settlement: Performance: Delivery to third person mutually agreed upon:

Wrongful acts of mutual agent. Where two parties have mutually arranged that one should deliver certain notes and ship certain property, paying the freight, to a third person, who should deliver the same to the other and take his receipt in full of all demands against the first, and afterwards deliver such receipt to him on his giving a like receipt back for the other party, the party who has delivered over the notes, shipped the property and paid the freight in full compliance with the agreement on his part, cannot be held responsible because the third person mutually agreed upon afterwards of his own motion refused to turn the same over except upon compliance with a further demand which the agreement did not authorize him to make.

Mutual agents: Unauthorized acts of agent: Mutual responsibility. Both parties are equally responsible for the unauthorized acts of a third person whom they have mutually chosen to act between them, and where one of them has done all that by the agreement he was to do, he is not to be held liable to the other for the failure of their mutual agent to do his part.

Heard April 13. Decided April 18.

Error to Kalamazoo Circuit.

This is an action of assumpsit brought by Hope against Crippen for damages for failure to deliver over certain notes alleged to have been received by Crippen from one Griffis to be delivered to Hope, in pursuance of an agreement between the parties. On the trial there was evidence given tending to prove a settlement embracing the only notes which in the end entered into the verdict and judgment, and a compliance by defendant with the terms of such settlement. The plaintiff recovered judgment, and the defendant brought error.

Balch & Howard, N. A. Earle and M. J. Smiley, for plaintiff in error.

May, Buck & Powers, for defendant in error.

MARSTON, J:

Counsel for plaintiff in error concedes in his brief and

CRIPPEN v. HOPE.

argument that the verdict and judgment was rendered for the amount due upon the Newton and Pierce notes. This being so it is only necessary to examine the alleged errors relating to that part of the case.

There was evidence tending to show that the parties had agreed to settle; that by the terms of this agreement these notes were to be placed by Crippen in the hands of Charles Scott; that Mr. Crippen was to ship a certain buggy and harness to Mr. Hope and pay the freight thereon, that Mr. Hope was to deliver to Scott a receipt in full for all demands against Crippen, which Scott was to receive and on receipt thereof deliver these notes to Mr. Hope, that this receipt from Hope to Crippen, Scott was to retain until Crippen should deliver to him a like receipt in full for Hope, when he, Scott, was to deliver to each party the receipt in full from the other. There was also evidence tending to show that Crippen had delivered these notes to Scott and had shipped the buggy and harness, paying the freight thereon, and that they were afterwards received by Hope; that Scott retained the notes for some time but Hope did not call for them, nor offer to give a receipt in full for Crippen; that Scott left these notes with one Kenyon for a short time as he was going away; that on his return Kenyon returned him the notes, and that he, Scott, still retained them. It also appeared that while Kenyon held the notes Hope offered to him the proper receipt as agreed upon, but that Kenyon refused to receive it or deliver up the notes unless Hope gave him a receipt in full between Hope and Crippen and Hope and one Griffis.

It did not appear that Crippen had any thing to do with this extra demand of Kenyon or that he had any knowledge of the demand so made.

At the request of plaintiff's counsel the court charged the jury that in case they found an agreement to settle as stated, "and that Scott or Kenyon, in whose hands the notes were, refused to deliver said notes to plaintiff, except upon his executing a receipt in full of all his own or

CRIPPEN v. HOPE.

Griffis' claims, then such settlement would not bind the plaintiff."

We think the court erred in so charging the jury. The parties had mutually agreed that the notes should be placed in a third party's hands to whom certain receipts should be delivered and upon the delivery of which the notes should be surrendered to the plaintiff, and that defendant should ship certain property to the plaintiff, paying freight thereon. The defendant upon shipping the property, paying the freight thereon and delivering the notes to Scott, had fully performed on his part. It but remained for the plaintiff to deliver the proper receipt and receive the notes. If when he attempted to comply with the agreement on his part the party holding the notes made a demand which he was not authorized by the agreement or by Crippen to make, for this the defendant could not be held responsible. The plaintiff is equally responsible with the defendant for the acts of such third person, as he was mutually chosen by them.

If the jury found that the defendant performed the agreement on his part, by shipping the property, paying freight thereon, and delivering the notes to Scott, he could not be held liable for what took place thereafter.

Under this view we do not consider it necessary to consider the remaining sixty errors assigned.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

SMITH v. SUPERINTENDENTS OF THE POOR OF LAPEER
COUNTY.

John P. Smith v. The Superintendents of the Poor of
Lapeer County.

Support of the poor by relatives: Proceedings not after the course of the common law: Review: Writ of error. Proceedings under the statute (*Comp. L. 1871, ch. 49*), to compel a son to support his mother, are summary in character and in no sense after the course of the common law, and cannot be reviewed on writ of error: the order contemplated as a result of such proceedings is not properly a judgment, and the method of enforcing it is by attachment: and the fact that the parties by voluntary arrangement have proceeded to form an issue and to have a jury trial, cannot affect the question of jurisdiction on review.

Submitted on briefs April 13. Decided April 18.

Error to Lapeer Circuit.

Gaskill & Geer, for plaintiff in error.

W. W. & M. N. Stickney and *J. B. Moore*, for defendants
in error.

COOLEY, CH. J:

The writ of error in this case must be dismissed for want of jurisdiction. The proceeding in the court below was had under the statute, to compel a son to support his mother. The statute contemplates that it shall be summary in its character, and it is in no sense after the course of the common law. The order which the circuit court makes is not properly a judgment, and the method of enforcing it is by attachment.—*Comp. L., ch. 49*. It is true that in this case the parties appear to have proceeded in the circuit court to form an issue and have a jury trial, but that was by voluntary arrangement, and cannot affect the question of review. The remedy for that purpose is not by writ of error.

The other Justices concurred.

AUDITOR GENERAL v. PULLMAN PALACE CAR CO.

The Auditor General v. The Pullman Palace Car Company.

Proceedings on appeal from an assessment of taxes: Review: Writ of error.
Proceedings under the statute (*S. L. 1872, p. 89*), on an appeal to the circuit court from an assessment of taxes made by the auditor general, are not judicial in the proper sense of that term, and cannot be reviewed on writ of error.

Heard April 13. Decided April 18.

Error to Ingham Circuit.

Andrew J. Smith, Attorney General, for plaintiff in error.

S. F. Seager, for defendant in error.

COOLEY, CH. J:

The writ of error in this case must be dismissed. The proceedings had in the court below were on appeal from an assessment of taxes made by the auditor general. The appeal to that court was taken under act No. 57 of 1872 (*S. L. Vol. I, p. 89*), and the proceedings under that act were evidently not intended to be judicial in the proper sense of that term. The statute was evidently designed to make the circuit court an appellate tax tribunal, and nothing more. Its conclusion would not be a judgment, but only an assessment.

There are difficulties in giving effect to such a statute, but we do not think it expedient to consider them in this proceeding, of which we clearly have no jurisdiction.

The other Justices concurred.

WILLEY v. SNIDER.

Lewis Willey v. Henry M. Snyder.

Chattel mortgages: Description of property: Definiteness: Notice. A description of property in a chattel mortgage as "One Durm bull, known as the Grinnalls bull,—said bull is four years old and weighs about 2,400 pounds," is not open to the objection that it is so vague and indefinite as to prevent the mortgage when duly filed becoming constructive notice to a subsequent purchaser of the bull from the mortgagor.

Descriptions of property: Interpretation: Surrounding facts. Written descriptions of property are to be interpreted in the light of the facts known to and in the minds of the parties at the time; and a subsequent purchaser or mortgagor is supposed to acquire a knowledge of all the attendant facts needful to his protection, and to purchase in view of that knowledge.

Descriptions: Identification. Descriptions do not identify of themselves, but only furnish the means of identification; they give certain marks or characteristics, or historical data or incidents, by the aid of which the thing intended may be singled out from all others, not by the description alone, but by that explained and applied.

Heard April 14. Decided April 18.

Error to Ionia Circuit.

Mitchel & Pratt, for plaintiff in error.

No counsel appeared for defendant in error.

COOLEY, CH. J:

An able and ingenious argument was made in this case to convince us that a description of property in a chattel mortgage as "One Durm bull, known as the Grinnalls bull,—said bull is four years old and weighs about 2,400 pounds," was so vague and indefinite as to prevent the mortgage, when duly filed, becoming constructive notice to a subsequent purchaser of the bull from the mortgagor. The position of the plaintiff is perhaps sufficiently shown by the instruction which he requested in the court below; namely, "that the description must be such as would enable a stranger, with the mortgage, to select the property."

It was shown in the case that the mortgagor had but

WILLEY v. SNYDER.

the one bull; that he was called a Durham, and was Durham blood in part, and that he was known as the Grinnalls bull. It would seem that the supposed stranger, with a knowledge of these facts and the mortgage in his hand, could have had no difficulty in selecting the property if he was a man of ordinary intelligence. It ought not to be very difficult to select one when there is only one to select from; especially when certain particulars are mentioned in which the animal would differ from all others in case the number had been greater.

But if a stranger is to be sent out to select property mortgaged, with no other means of identification than such as are afforded by the written description, and without being at liberty to supplement that information by such as can be gained in the mortgagor's neighborhood by inquiry of those who know what property the mortgagor was possessed of which would answer the description in the instrument when it was given, and by possessing himself of such other circumstances as persons usually avail themselves of in applying written descriptions to the things intended, it is much to be feared that the stranger would be so often at fault that chattel mortgages, if their validity depended upon his success in identifying the property, would seldom be of much value as securities.

Written descriptions of property are to be interpreted in the light of the facts known to and in the minds of the parties at the time. They are not prepared for strangers, but for those they are to affect; the parties and their privies. A subsequent purchaser or mortgagor is supposed to acquire a knowledge of all the facts, so far as may be needful to his protection, and he purchases in view of that knowledge. If he purchases a bull known in the neighborhood by a particular name, he is chargeable with notice of that fact. A mortgage of the bull by that name, if duly filed, would be as good against him as against the man who gave it. It would be a singular defense to be set up by him to the mortgage, that being a stranger, he discov-

WILLEY v. SNYDER.

ered no such name on or about the bull, and therefore could not in fairness be bound by a mortgage which undertook to identify the animal by the name. Descriptions do not identify of themselves; they only furnish the means of identification. They give us certain marks or characteristics,—perhaps historical data or incidents,—by the aid of which we may single out the thing intended from all others; not by the description alone, but by that explained and applied. Even lands are not identified by description until we place ourselves in the position of the parties by whom the description has been prepared, and read it with the knowledge of the subject matter which they had at the time.

We have been unable to discover that the plaintiff in error was wronged by any rulings in the court below, and the judgment must be affirmed, with costs.

The other Justices concurred.

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**The People on the relation of Joseph O'Blinskie v.
The Judge of the Circuit Court for the
County of Kent.**

Written findings: Judgment: Provisional action: Ejectment: Statutory new trial: Time. Where on a trial by the court without a jury written findings are requested, a judgment entered up before the findings are finally completed and filed, is premature and to be regarded as provisional action merely, which only becomes perfected when the findings are completed; and the time for taking a new trial in ejectment, as matter of right under the statute, should date from the day when judgment becomes thus perfected.

Ejectment: Statutory new trial: Time: Pendency of writ of error. Whether, where writ of error is sued out, the time of the pendency of the case in error is to be excluded, in computing time within which new trial in ejectment may be demanded as matter of right under the statute:—*Quære?*

Heard April 18. Decided April 19.

Application for *Mandamus*.

O'BLINSKIE v. JUDGE OF KENT CIRCUIT.

This application is made to have the respondent directed to vacate an order, in an ejectment cause brought by James M. Allen against the relator, denying a motion (1) for leave to move for new trial and (2) for a new trial. The cause had been tried by the court without a jury April 12, 1872; finding filed and judgment entered for plaintiff August 26, 1872; additional and further finding at request of defendant filed June 5, 1874; writ of error sued out July 15, 1874; judgment affirmed January 28, 1875; remittitur filed December 28, 1875. The motion on which the order complained of was granted was made September 19, 1875, heard January 14, 1876, and decided February 4, 1876.

Taggart, Allen & Wolcott, for relator.

L. D. Norris, for respondent.

COOLEY, CH. J:

Where a cause is tried by the circuit judge without a jury and written findings are requested, the law contemplates that these shall be filed as the foundation of judgment. If for any reason of inadvertence or otherwise the judgment is entered up before the findings are filed, or if the findings are defective and are afterwards corrected, we are of opinion that the judgment so entered up previously is to be regarded as in the nature of provisional action, which only becomes perfected when the findings are completed, and that the time for taking a new trial as matter of right should date from the day when judgment could have been taken on the completed finding.—See *Stansell v. Corning*, 21 Mich., 242.

Whether, where writ of error is sued out, the time of the pendency of the case in error is to be allowed for, we do not decide, as it is immaterial in this case.

The other Justices concurred.

BURROWS v. BAILEY.

George L. Burrows v. Josiah P. Bailey and another.

Evidence: Letter of guardianship. In an action of replevin for timber, where title is sought to be deduced in part through a guardian of minor heirs, the fact that the letter of guardianship, though the minors were shown to be over fourteen years of age, did not show in terms that the guardian was nominated by them, or that they were asked to nominate or to appear for that purpose, will not justify its exclusion as evidence.

Letter of guardianship: Certificate: Recitals: Presumptions: Regularity. A letter of guardianship is in the nature of a certificate or commission, and in the absence of any statutory provision requiring it, it is not essential to its validity as evidence of the appointment, though it be preferable, that it should recite the mode and particulars of the nomination, and all reasonable presumptions must be indulged in favor of its having emanated regularly and after lawful proceedings.

Replevin: Description of property: Variance: Certificate of appraisal. Whether there is a variance in the description of the property as contained in the writ of replevin and declaration, and that specified in the certificate of appraisal, the plaintiff is under the necessity of showing that the property taken on the writ was the same as that described in the writ and declaration:—*Quære?*

Heard January 14. Decided April 20.

Error to Cheboygan Circuit.

W. S. Humphrey and Gaylord & Hanchett, for plaintiff in error.

Atkinson & Atkinson, for defendants in error.

GRAVES, J:

Burrows brought replevin against defendants, and in his writ described the property claimed as follows: "The logs from sixty white pine trees containing one hundred and eleven thousand feet, board measure, of forty per cent white pine: said logs being marked 'J X B,' and lying in the boom of J. B. Bailey & Son, at the mouth of Pigeon River, in the county of Cheboygan and state of Michigan, cut from the following lands, viz.: the southeast quarter of the northwest quarter, and the northwest quarter of the northeast quarter of section twenty-five, town thirty-five north, range

BURROWS v. BAILEY.

two west, state of Michigan." The sheriff made return that he had summoned the defendant Josiah P. Bailey, but could not find the other defendant in the county. He also made return that by virtue of the writ he took the property mentioned in it, caused it to be appraised, etc., and thereupon delivered to the plaintiff the said property so seized and taken, upon a bond which accompanied the return. The certificate of appraisal described the property appraised at the sheriff's instance as "one small boom of white pine logs containing about one hundred and ten thousand feet, board measure, now lying at the Fisher Planing Mill, at the forks of the Cheboygan and Black Rivers, and marked 'J X B' and 'Rust.'"

The condition of the bond given to the sheriff, after specifying the commencement of the action, described the property in the same way as in the writ, and required return of the same property, if return thereof should be adjudged. The declaration also described the property as in the writ, and alleged that defendants still detained it. This statement of detention had reference, of course, to the time the suit was instituted.

The defendants pleaded the statutory general issue, without notice of any special matter of defense, and no question appears to have been raised in any form, either in the cause or collaterally, as to the regularity of the sheriff's action in executing the writ. So far as the record discloses, all parties acquiesced in the correctness of his proceedings.

When the trial came on, the plaintiff endeavored to found his right to maintain replevin by proof of his ownership of an undivided interest in the land where the logs were cut, and his acquirement of the right of action which had come to his co-owners by means of the cutting. And it appeared that one Aloney Rust, a former co-owner, had died in 1874, leaving six children who had inherited his right, and that three of these children, namely, Aloney J., Ralph E., and John H. Rust were minors over the age of fourteen, and residents of Saginaw county. In order to trace his right

BURROWS V. BAILEY.

and title the plaintiff offered in evidence a certified transcript of a letter of guardianship of these minors, issued to Jane Rust by the probate judge of Saginaw county. It did not show in terms that Jane Rust was nominated by the minors, or that they were asked to nominate or to appear for that purpose, and the defendants objected to its admission on that ground, and the court sustained the objection.

The plaintiff then called one of the minors, who swore he was twenty years of age, and that he and his two minor brothers were actually present before the judge on Jane Rust's appointment. He was then asked whether he and his brothers did in fact nominate her to be their guardian. And on putting the question, plaintiff's counsel stated he offered to prove that the minors did nominate her and that the appointment was made thereupon. The defendants' counsel then objected on the ground that the fact of nomination by the minors was matter of record, and the court excluded the evidence.

In ruling out the letter the court erred. In so deciding it was assumed that the paper was void upon its face, however regular the judge might have acted in making the appointment. The question did not touch the grounds of action, or the mode of action of the judge, down to the act of issuing the letter, but it related to the sufficiency of the letter itself as evidence, even *prima facie*, that Jane Rust had been lawfully constituted guardian of the minors, and the ruling must be construed as maintaining that as the letter contained no recital of the fact of nomination by the minors, or any recital of a state of facts permitting the judge to both nominate and appoint, it was worthless as evidence of an appointment unless supported by record proof from the probate office of the facts just mentioned.

Unquestionably it would be far better for a letter to explain expressly the mode of nomination, but there is no regulation which requires it.

The instrument is in the nature of a certificate or commission, and the statute nowhere directs any special form,

BURROWS v. BAILEY.

and there is nothing to imply that its validity, as evidence of the appointment, requires that it should recite the circumstances in regard to the nomination.

When the minor is over fourteen, and appears in person before the judge of his county, and orally nominates, the judge is in a situation to take cognizance of the matter, and if he does so, his letter, or certificate or commission of appointment, is entitled to favorable presumptions and ought not to be considered void for not reciting the facts before mentioned. In the absence of any thing to the contrary, it should be deemed to have emanated regularly and to rest upon lawful proceedings. The evidence was certainly good, *prima facie*, and admissible.

After the rejection of this evidence the cause proceeded, but the defendants gave no evidence at all. The plaintiff's proof established his ownership of an undivided interest in the land where the logs were cut, and the defendants appeared to have taken the logs by trespass. No evidence was shown to the jury that the stuff taken by the sheriff on the writ was identical with that claimed by it. By request to charge, a question was made by the plaintiff upon his right to recover against defendants, upon the supposition of their being mere trespassers and he being absolute owner of an undivided interest in the land, and the court decided against the plaintiff's right to recover under such circumstances. The plaintiff raises the same question here, but the conclusion reached, that the court erred in rejecting his evidence to prove the entire right in himself before suit, makes it a question rather speculative than otherwise, and we do not deem it expedient to discuss it.

As regards the question, whether the plaintiff was under necessity of putting in proof to show that the property taken on the writ was the same to which he had shown title, the court are not agreed.

As, however, it seems probable from the record that the plaintiff was taken by surprise by the objection made, we have concluded, under the circumstances, to order a new

BURROWS v. BAILEY.

trial at the plaintiff's cost, as more likely to conduce to justice than the affirmance of a judgment against him, in a case where the defect in his case, if any, was only technical.

The other Justices concurred.

Ludlow A. Battershall and others v. Henry Stephens.

Written evidence: Construction: Question for the court. Where a question in issue depends upon written correspondence put in evidence, the authenticity and bearing of which is undisputed, it is for the court to expound it and to instruct the jury directly and distinctly as to its legal effect upon the issue, and not to leave it to the jury to interpret and construe it.

Registry law: Purchaser in good faith: Documentary evidence: Charge to the jury. The documentary evidence in this case showing distinctly that the plaintiff was not a purchaser in good faith and for a valuable consideration within the intent and meaning of the registry law, it was error for the court to lead the jury to suppose it was competent for them to find otherwise, instead of declaring to them the necessary legal effect of the unquestioned facts.

Registry: Priority of record: Purchaser in good faith: Moral integrity. Whether one claiming protection under the registry law against a prior-unrecorded deed is or is not a purchaser in good faith and for a valuable consideration, does not necessarily involve any question as to his integrity or the merely moral quality of his acts and conduct in obtaining the conveyance.

Deeds: Registry: Purchase in good faith: Prior unrecorded deed. A purchase of one not claiming to be present owner and of what is understood not to be an assured title, but merely something that will aid in getting rid of or overcoming any rights others might hold or assert, and which is made without any idea of dealing on the footing of an actual buying or selling of the land, is not such a purchase in good faith as will prevail over a prior unrecorded deed.

Conveyances: Registry: Priority of record. A transfer of lands worth a thousand dollars for a present payment of twenty-five dollars, which was not designed as a sale of the lands, but as a trade for an indefinite amount to be ascertained afterwards and to depend upon the success of the adventure, is not such a dealing as will invest the grantee with a right which by force of the registry law is sufficient to overcome a prior-unrecorded deed.

Heard April 11. Decided April 20.

Error to Lapeer Circuit.

BATTERSHALL v. STEPHENS.

Gaskill & Geer, for plaintiffs in error.

E. W. Corey and *M. E. Crofoot*, for defendant in error.

GRAVES, J:

Stephens sued in trover for the alleged conversion of a quantity of pine saw-logs taken from the west half of north-west quarter of section thirty-five, in town nine north, of range eleven east, county of Lapeer, and recovered.

The defendants below allege error. The case turned upon the ownership of the land. It appears from the record, that Battershall, one of the plaintiffs in error, conveyed to one Albert Brett, by deed dated August 26, 1856, and recorded September 16, 1856, and that Brett reconveyed to Battershall by deed dated May 10, 1864, but which deed was not recorded until September 24, 1870. The registry of deeds, therefore, failed to disclose any conveyance by Brett between the time of registry of the deed to him from Battershall on September 16, 1856, and the registry of the deed from him to Battershall September 24, 1870, and of course it also failed to disclose during the same period any title in Battershall.

During this interval Mr. Stephens procured a quit-claim deed from Brett, dated June 4, 1869, and which he caused to be recorded on the 10th of July thereafter. It therefore became a material question on the trial whether Mr. Stephens, as grantee in this quit-claim deed from Brett, was a purchaser in good faith and for a valuable consideration, as against the prior unrecorded deed from Brett to Battershall, within the meaning of the recording laws.—§ 4231, *C. L.*; *Shotwell v. Harrison*, 22 *Mich.*, 410.

Mr. Stephens resided at Almont in this state, Battershall in the city of New York, and Brett in the adjacent city of Brooklyn, and Mr. Stephens desiring to negotiate about the land, addressed Brett the following letter:

BATTERSHALL V. STEPHENS.

"ALMONT, MICHIGAN, May 10, 1869.

"*Mr. Albert, Brett, Brooklyn, New York:*

"DEAR SIR:—I have learned that you are the owner of the west half northwest quarter section thirty-five, town nine north, range eleven east, containing eighty acres, in Lapeer county, Michigan, and if so, and you wish to sell and can give me a good title, I would like to purchase. Will you, as soon as possible, advise me and oblige.

"Yours truly,

"HENRY STEPHENS."

Mr. Brett made the following reply:

"NEW YORK, May 14, 1869.

"*Henry Stephens, Almont, Mich.:*

"DEAR SIR:—Your favor of the 10th inst. is received. I did own a good many acres of land in Michigan, but several years since I gave a quit-claim deed for the most part of it, and have not paid any taxes for some five or six years. If there is any land standing in my name and a quit-claim deed would be of any service to you, if you make it out I will sign it for a moderate sum.

"Yours truly,

"ALBERT BRETT."

Shortly after the receipt of this letter Mr. Stephens wrote again and enclosed a quit-claim deed to be executed and returned, and sent with it a check for twenty-five dollars. This letter seems to have been lost after its reception by Brett, and Mr. Stephens kept no copy of it. The latter testified that his subsequent letter explained it. Mr. Brett, on receiving the letter with the deed and check, wrote as follows:

"CHICAGO, ILL., June 20, 1869.

"*Henry Stephens, Almont, Mich.:*

"DEAR SIR:—Your letter of June 4th, with check for twenty-five dollars and quit-claim deed for me to sign, came to hand at this place yesterday. I am going west on busi-

BATTERSHALL v. STEPHENS.

ness for my house, and they sent my letters to this place. I expect to be in Detroit on my return home, in about two weeks, and will then sign the deed before the commissioner and return it to you. I shall have some business with Alvan Wilkins, 83 Griswold St., and he can find me a commissioner. If the deed should prove an advantage to you, I shall be glad to receive any further sum that you see fit to send me. I hope it will prove a good thing for us both. I have not the least idea about my title to the property; all I know is, that I had deeds for nearly two thousand acres of land in different parts of Michigan, and paid taxes for several years, and found I was running in debt all the time. I sold and gave a quit-claim deed for the most part of them, but which of the lots of land I have no means of knowing, as I kept no record of them. As soon as I get to Detroit I will sign the deed and return it to you.

“Yours truly,

“ALBERT BRETT.”

Mr. Stephens answered by the following letter, it being the one referred to in his testimony as containing explanations in regard to what he had written in the lost letter:

“ALMONT, MICH., June 22, 1869.

“*Mr. Albert Brett:*

“DEAR SIR:—Yours of 20th, from Chicago, received. You speak in such a way in your letter that if I should succeed in doing well in buying the other claimants' titles, that if we had no further understanding my purchase from you would be left in a very indefinite state. I prefer to have it all known beforehand. I bought this month from the party who owned the east half of the northwest quarter, the east half, that is, the eighty acres laying along side of the west half, which you are supposed not to have deeded. I paid one thousand dollars for it, three years, seven per cent. Yours is of equal value; the land and timber is as nearly alike as possible; also location is as good. Now, I want yours, and would be very glad to buy it and pay the same, but there are a great many liens and tax-titles upon

BATTERSHALL V. STEPHENS.

it, and therefore all I pay may be lost. I may not be able to get up all these titles, and the want of one only, with a long legal contest, might make it better for me to let it alone. Yet I may succeed in getting up the other titles for less than five hundred dollars. Therefore I will make you this proposition: I will go on, after I have received the quit-claim from you, and perfect the title on the best terms I find possible, and after I get them all up and have a clear title I will pay you one-half of any amount, whatever it may be, that I am able to clear it up and get the titles and taxes together for, less than one thousand dollars, or half the difference between the cost of the land to me and one thousand dollars. For instance, if it costs me five hundred dollars, the difference less than one thousand dollars is five hundred dollars; therefore I would pay you two hundred and fifty dollars, and I would get two hundred and fifty dollars for my expenses and trouble, and would make no charge for my own services, or except in case it went into litigation, then all the legal expenses would be justly part of the cost. You have the deed I forwarded, and can in Detroit go before any notary or justice of the peace and have it acknowledged, and it is not necessary to get clerk's certificate when acknowledged in this state. I would refer you, as to my ability to do as I agree, and as to my character for integrity, to Mr. James Moore, of John Stephens & Co., Detroit; also C. M. Davison, cashier Second National Bank, and Messrs. Buhl, Ducharme & Co., hardware dealers, Detroit.

“Very truly yours,

“HENRY STEPHENS.”

The correspondence closed with the following from Mr. Brett:

“DETROIT, July 6th, 1869.

“*Henry Stephens, Esq., Almont, Mich.* :

“DEAR SIR:—Your letter of the 22d is received; it is very satisfactory; I am glad I am in so good hands, and hope your title will turn out all right. You may send me

BATTERSHALL v. STEPHENS.

any sum you may think right when you get the title perfect. Enclosed please find the quit-claim deed, signed as you requested.

"Yours truly,

"ALBERT BRETT."

Mr. Stephens testified, that at the time of paying the twenty-five dollars he had no notice that Brett had conveyed the title, and at the time he obtained the deed from Brett he had no notice or knowledge that Battershall had or claimed to have any interest in the land, and that he "knew of no other titles or liens, except for taxes, save the title held by Brett."

Now the question raised under the registry law by this action depended upon the correspondence in evidence, and as there was nothing concerning its authenticity or truth or bearing to cause difficulty, it was the province and duty of the court to expound it in as far as it related to the point in question, and to instruct the jury directly and distinctly as to its legal effect upon the issue.

This was not done, however. Throughout the judge charged upon the theory that it was for the jury to examine and interpret this evidence, and that it was admissible for them to find one way or the other, according to the view they might take of it.

The first proposition of the charge was in substance, that if they should find that Stephens purchased of Brett in good faith, and took his conveyance supposing he held the original title, and paid him twenty-five dollars, relying on the fact that the registry showed the title in him, and without any knowledge or notice that Brett had deeded to Battershall, or any body else, then the unrecorded deed of the latter would be void as against that from Brett to Stephens, by force of the recording law; and later the judge told the jury they might take into consideration all the correspondence between Brett and Stephens, and the price paid for the land, in ascertaining whether Stephens was a purchaser in good faith.

Now we think it distinctly appeared from the correspond-

BATTERSHALL V. STEPHENS.

ence, that Mr. Stephens was not a purchaser in good faith and for a valuable consideration within the intent and meaning of the recording law, and that the court erred in leading the jury to suppose it was competent for them to find otherwise, and in omitting to declare the necessary legal effect of the unquestioned facts.

Whether one claiming protection under the recording laws against an unregistered deed is or is not a purchaser in good faith and for a valuable consideration, does not necessarily involve any question as to his integrity, or the merely moral quality of his acts and conduct in obtaining the conveyance; he may act with perfect uprightness as a man, and with pure motives, and still not be entitled to have his deed overreach a prior unrecorded one.

The question may turn upon other considerations altogether. There may be honest incidents having a recognized legal influence to give the transaction a determinate character, and one not answering to the legal idea denoted by the expression in the statute. For example, it is laid down in the supreme court of the United States (contrary to what our statute requires), that the bare fact that the deed set up against the unrecorded conveyance is a quit-claim is sufficient in itself to deprive the grantee in it of the character of a purchaser in good faith.—*Oliver v. Piatt*, 3 How., 363; *May v. LeClaire*, 11 Wall., 217; *Villa v. Rodriguez*, 12 Wall., 323. It has also been very often held in many courts of the highest character that in case the consideration is merely a past indebtedness, the purchaser is not entitled to be regarded as a *bona fide* purchaser. In the present case nothing appears to impeach the honor or motives of Mr. Stephens.

His right to claim superiority over Battershall's unrecorded deed does not turn upon such considerations or on any thing implying discredit. The difficulty springs from business incidents which serve to define the transaction and fix its legal sense and efficacy, and recurring to these it is very plain, we think, that Brett did not propose to sell, and

BATTERSHALL v. STEPHENS.

that Stephens did not suppose he was buying the land or an assured title. All that Brett bargained, and all that Stephens imagined he was getting was the appearance or uncertain token of a title, and which might be found useful, and perhaps a master weight in getting in, or getting rid of, or overcoming any rights others might hold or assert. Brett did not pretend to be owner. He made no claim. Mr. Stephens understood this, and he frankly wrote Brett that the land,—that is the lawful title,—was worth one thousand dollars, and spoke freely of the dubious nature of his chance to secure any real title even with the aid of Brett's deed. When twenty-five dollars was talked of as the price, both understood what they were about, and that they were not dealing on the footing of an actual buying and selling of the land. Then again, the negotiations did not conclude in a trade for twenty-five dollars. They were kept up until Brett got Stephen's last letter. Nothing was settled earlier. The deed was not delivered until after that time, and when the negotiations culminated it was not a sale of land for twenty-five dollars which Stephens understood to be worth one thousand dollars, but a trade for an indefinite amount to be ascertained afterwards, and to depend upon the success of the adventure.

In short, it was not an out and out purchase or trade for any fixed sum, but an enterprise of chance,—a piece of speculative traffic,—and entirely wanting in the lineaments and characteristics of a real transaction where one man assumes actually to sell and another assumes actually to buy valuable land, and the parties consider themselves dealing upon the faith that the land and title will follow the grant.

Under these circumstances, the quit-claim deed to Mr. Stephens cannot be held to have invested him with a right which by force of the registry law is sufficient to destroy the prior unrecorded deed of Battershall and annihilate the title of the latter.—*Fitzhugh v. Barnard*, 12 Mich., 104; *Munroe v. Eastman*, 31 Mich., 283; *Palmer v. Williams*,

BATTERSHALL v. STEPHENS.

24 Mich., 328; *Vane v. Vane*, L. R. 8 Chy. App., 383; 5 Eng., 607.

If correct in this, the judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

James Stadden v. Daniel Hazzard and others.

Written instruments: Construction. It is for the court, and not the jury, to construe and determine the legal effect of written instruments introduced in evidence.

Practice: Rulings that do not prejudice. But where the court has left the question of the legal effect of a written instrument to the jury, their verdict will not be disturbed on review where upon a proper construction of the instrument no different verdict could, consistently with the other facts involved and determined by the verdict rendered, have been properly found; such a ruling could not have been prejudicial to the party complaining of it.

Lease: Mortgage: Construction: Wheat crop: Title. An agreement whereby one, in consideration of a promise to pay him four hundred dollars, lets to another a parcel of land for a year, agreeing to prepare the land and sow it to wheat, and authorizing the latter to enter the premises and harvest the same and do all things necessary to secure the crop, is a lease and not a mortgage; and under it the title to the wheat crop in question would be in the lessee, and not subject to attachment against the lessor.

Heard April 11. Decided April 30.

Error to St. Joseph Circuit.

Alfred Akey and *Charles Upson*, for plaintiff in error.

C. J. Beerstecher and *H. H. Riley*, for defendants in error.

MARSTON, J:

Plaintiff in error brought this action to recover upon a bond executed by the defendants under § 5278, *Compiled Laws*.

STADDEN v. HAZZARD.

Defendant David Hazzard claimed title to the property seized under an instrument* dated September 4, 1873, between himself and Seth E. Wells, the defendant in the attachment suit. The plaintiff claimed that the instrument in question constituted a mortgage; that Hazzard was not the general owner of the property and could not therefore maintain his defense under the bond. He also claimed that this so-called mortgage was given with intent to hinder or delay Wells' creditors and was therefore void as against the plaintiff. The defendants claimed that the instrument in question was a lease between Wells and Hazzard; that it was given in good faith; that Hazzard was therefore the owner of the property in question, and plaintiff could not recover.

The court fairly submitted to the jury the question whether this instrument was given in good faith and without intent to hinder, delay, or defraud Wells' creditors, and also left it to the jury to find whether the instrument was a lease or a mortgage.

Under the charge as given, the jury might have found that the instrument was given as security for the liability of Hazzard as surety for Wells, or for the payment of indebtedness existing and due from Wells to Hazzard at the

* This agreement, made the 4th day of September, A. D. 1873, between Seth E. Wells, of St. Joseph county, and state of Michigan, of the first part, and David Hazzard, of the same place, of the second part: Witnesseth, that the said Seth E. Wells hereby agrees to demise and let to the said Hazzard, and by this indenture covenants and agrees with the said Hazzard to lease to him certain real estate, described as follows, to-wit: Being fifty-five acres, part of the farm known as the Wells farm, situate in the township of Nottawa and county of St. Joseph, and state of Michigan, for the term of one year from date. Said land the said Hazzard desires to sow to wheat, and the said Wells hereby agrees that the said Hazzard may enter the said premises for the purpose of harvesting the same, and to do all things necessary to secure the said wheat crop; said Hazzard is to have all the straw. In consideration of this lease, the said Hazzard hereby agrees to pay the said Wells five hundred dollars, one hundred and twenty-five dollars to be paid within fifteen days from date hereof, balance to be paid within one year from this date. And the said Wells further agrees to prepare the said land and sow the same with wheat for the said Hazzard.

STADDEN v. HAZZARD.

date of the lease, without intent to hinder or delay creditors, in which event they were instructed to find for the plaintiff the difference between the amount of such indebtedness and the value of the wheat, not exceeding, however, the amount of the plaintiff's claim.

If any error was committed in this charge the plaintiff is not the one to complain, as it was more favorable to him than the facts would warrant. The proper construction and legal effect of the instrument was for the court, and not the jury, to determine. The instrument in question was not a mortgage. There are none of the essential features of a mortgage incorporated in it. It was simply a lease, and defendant Hazzard was the general owner of the property raised under it. The court submitted to the jury the object and intent of the parties in executing this lease; this was all the plaintiff was entitled to.

The judgment of the court below must be affirmed, with costs.

The other Justices concurred.

**The Fort Wayne and Elmwood Railway Company
v. The City of Detroit.**

Street railway: Ordinance: Construction: Repaving: Materials: Repairs.

Under an ordinance requiring a street railway company to "keep the surface of the street inside the rails and for two feet four inches outside thereof in good order and repair, provided, however, that upon the paved portion of said streets the materials for repaving shall be supplied at the expense of the city," where the city directs the company to "raise and repair" that portion of the pavement which is within the rails, at a time when it had become so worn and dilapidated that a reconstruction with new materials was essential, the city is bound to bear the expense of the materials; such repairs amount to repaving within the meaning of the proviso.

Submitted on briefs April 12. Decided April 20.

Error to Superior Court of Detroit.

PORT WAYNE & ELMWOOD R. R. CO. v. DETROIT.

Pond & Brown and *G. V. N. Lothrop*, for plaintiff in error.

D. C. Holbrook, *City Counselor*, for defendant in error.

COOLEY, CH. J:

The controversy in this case only involves the construction of an ordinance under which the track of the plaintiff has been laid in certain of the streets of Detroit. By that ordinance the railway company was required to "keep the surface of the streets inside the rails, and for two feet four inches outside thereof, in good order and repair," "provided, however, that upon the paved portion of said streets the materials for repaving shall be supplied at the expense of the city."

The plaintiff's case is, that the city has directed the company to "raise and repair" that portion of the pavement which was within the rails, at a time when it had become so worn and dilapidated that a reconstruction with new materials was essential; and that treating this as a repavement, it has demanded of the city the material for the purpose, and on a failure of the city to comply with the demand, has proceeded to supply the materials itself. This suit is to recover the value of these materials. It is claimed on the part of the city that the proviso in the ordinance applies only to the repaving of the whole street; and that any requirement which falls short of this is to be understood as a requirement of repairs only.

Such a construction would put it in the power of the city to nullify the proviso entirely. A street may not all require repaving when a part of it does, and it is competent to order one part repaved while the remainder is left for further use with the existing pavement. If that is a repavement under the proviso only when the whole street is ordered repaved, the city has only to order the railway company from time to time to repair that portion of the street

FORT WAYNE & ELMWOOD R. R. CO. v. DETROIT.

specified in the ordinance, and then by excepting that portion from any ordinance for repaving the street, it may succeed in relieving the city of the whole burden of keeping the part set apart for the railway company in condition for use at all times, because as to that part there would then be no repavement in the sense contended for. This could not have been the intent of the ordinance. It is reasonable, we think, to suppose that when the city undertook to bear the cost of materials for repaving, the possibility was contemplated that the repaving of the track of the railway company might become essential when the remainder of the street did not require it; and when an order is made upon the company which it cannot comply with except by a reconstruction of the pavement within its track, this must be considered as such a requirement as calls for repaving within the meaning of the proviso in question.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

The People v. George Mott.

Fraudulent procurement of signature to written instrument: Statute construed.

The clause of the statute (*Comp. L. 1871, § 7590*) relating to the deceptive obtainment of one's signature to a written instrument, is not subject to the objection that it is of no legal force or efficacy because it does not contain the word "false," nor any other term or expression of equivalent import, in the description of the facts to constitute the offense; the first branch of the section which specifies the intent and falsity of the fraud applies to and characterizes the second branch thereof.

Fraudulent procurement of signature to written instrument: Forgery. It is not essential to the statutory offense of fraudulently obtaining one's signature to a written instrument that the facts should be sufficient to make out a forgery; the statute refers to forgery only to distinguish the kind of instruments which are the subjects of the offense, i. e., such as if forged would support a charge of forgery.

PEOPLE v. MOTT.

Informations: Variance: Description: Amendments. Where it is claimed on the introduction of the note in evidence, the signature to which is alleged to have been fraudulently obtained, that there is a variance between the note and the description of it in the information, in that the words "North Branch" appended to the date were omitted in the pleading, it is competent to allow an amendment to meet the objection.

Submitted on briefs April 12. Decided April 20.

Exceptions from Lapeer Circuit.

C. P. Thomas and Gaskill & Geer, for the respondent.

Andrew J. Smith, Attorney General, for the People.

GRAVES, J:

This is a case on exceptions after verdict and before judgment.

The defendant was charged with having obtained the promissory note of one Robert Smith on the false pretense that he, defendant, had received a letter from Mr. Baldwin requiring Smith to pay thirty dollars for legal services of Mr. Baldwin for Smith in a case where defendant was Smith's junior counsel. There was the further charge that the note was obtained for sixty dollars by the false pretense that it called for only thirty dollars. The information was based on § 7590, *C. L.*

The defendant objects that the second branch of the section, which relates to the deceptive obtainment of one's signature to a written instrument, is of no legal force or efficacy, because it omits the word "false" in the description of the facts to constitute the offense, and contains no term or expression of an equivalent nature.

The objection has no merit whatever. Even the reason assumed is not true.

The first branch of the section, which specifies the intent and falsity of the fraud, applies to and characterizes the second branch.

Complaint is also made that the information charged no offense because its facts showed that defendant had done

PEOPLE v. MOTT.

nothing to make him liable as for forgery. This point is without force. The statute does not confound the obtaining of a person's signature to a written instrument by false pretenses with the offense of forgery. It refers to that offense to distinguish the instruments in regard to which the offense in question may be committed. The instrument to which one's signature may be fraudulently obtained within the sense of this statute must be one of that kind upon which, if forged, a charge of forgery could be maintained. Certainly the instrument alleged to have been deceptively obtained here belongs to a class in respect to which the charge of forgery could be lawfully brought.

It is further objected that the note given in evidence varied from the description in the information. The note itself contained after its date the further words "North Branch," but in setting it out these words were omitted in two out of three places where it was copied in the information, and the court allowed the words to be inserted by amendment. In this there was no error.—§ 7926, *C. L.* Whether there was strictly any occasion for an amendment, it is needless to consider. This disposes of everything worth noticing, and we see no ground whatever for disturbing the conviction, and it should be certified to the court below that the exceptions are overruled, and that judgment ought to be awarded on the verdict.

The other Justices concurred.

John Williams v. Mary Ann Guarde.

Services in aid of prostitution; Brothel; Mistress. A recovery in a court of justice for services performed in aid of prostitution, as mistress of a brothel, etc., is not permissible; such services have no value whatever in law.

WILLIAMS v. GARDE.

Defense based on one's own turpitude: Costs. On reversing the judgment because of the iniquity of the transactions out of which the claim arises, costs will not be awarded to the plaintiff in error for being successful in a defense based on his own turpitude.

Heard April 12. Decided April 20.

Error to Muskegon Circuit.

McReynolds & Keating, for plaintiff in error.

C. C. Chamberlain, for defendant in error.

COOLEY, CH. J:

The suit in the court below was by a woman to recover the value of personal property detained from her by the defendant, and also to recover the value of services performed by her for defendant in a house of prostitution of which he was proprietor. For the property she failed to recover; for the services she had judgment at the rate of five dollars per week. The services, according to plaintiff's testimony, consisted in household work, tending the bar of the establishment, and a part of the time acting as its mistress and managing the inmates. On this branch of the case, which ought to have been rejected at once as unworthy of the attention of a court of justice, a great deal of evidence was taken, and the disgusting details of brothel management were brought out and given to the jury. The charge of the circuit judge puts the case to the jury fairly if the evidence were such as to justify it; but when the case is clearly and unmistakably one in which the plaintiff is seeking to recover for services performed in an immoral and criminal business, there is no basis whatever for instructions to the jury which leave them at liberty to separate the services from the business and to render a judgment for their value irrespective of the purpose which they were to subserve. On the plaintiff's own testimony it is perfectly manifest that she entered the defendant's service knowing all about it, and that she performed the labor she demands

WILLIAMS v. GUARDE.

pay for in aid of prostitution. The judge on this evidence should have instructed the jury that in law such services have no value whatever.

The judgment must be reversed, but as from the present record it appears probable that the plaintiff may have a good cause of action for the personal property, the cause will be remanded to give opportunity for a new trial on that branch of the case.

As the judgment is not reversed because of any merits in the defense, but because of the iniquity of the transactions out of which the claim arises, and in which the plaintiff in error appears in a light even more discreditable than the woman herself, we shall not give him costs as a reward for being successful in a defense based on his own turpitude.

The other Justices concurred.

Benjamin Wilber v. Gerry Goodrich.

Estoppel: Execution sale: Bidding. Attending and bidding at an execution sale, as of the property of a third person, will estop such bidder from setting up title in himself to the property sold, as against a purchaser whom he by his acts has induced to believe that he made no claim of title.

Evidence: Transcript: Judgment. A transcript from a justice's docket which is not certified as a transcript may be proved by the oath of the justice; but where neither certified nor otherwise proved it is not admissible in evidence to prove the judgment.

Submitted on briefs April 13. Decided April 20.

Error to Lapeer Circuit.

Gaskill & Geer, for plaintiff in error.

W. W. Stickney, for defendant in error.

CAMPBELL, J :

Wilber sued in trover for the conversion of certain logs. The defense was, that they were his son's property and purchased at execution sale by Harvey Goodrich, under whom defendant claims. There was no evidence of the son's title except that Benjamin Wilber was a bidder at the execution sale, and was claimed by his conduct to have become estopped from denying that title.

The judgment was proved by what was set up as a transcript from the docket of John Stevenson. It is not certified as a transcript by either Stevenson or any one else purporting to be a justice or to hold his docket. In the absence of such a certificate it could have been proved by the oath of Stevenson; but although he was sworn, he was not called on to prove the judgment.—See *C. L.*, § 5489-90.

The entry contains enough to show a valid judgment on issue joined and trial between parties who appeared in court. It further appeared that the suit was an attachment proceeding and seemingly regular, but this was of no importance to sustain the judgment. The files were properly proved by secondary evidence, and except for the informality in the transcript there appears no defect in the proofs.

The question of estoppel was fairly submitted to the jury. If Wilber attended and bid at the sale, and induced Goodrich to act on the supposition that he made no claim of title, that would be proper evidence against him.

We regret that the formal slip requires us to reverse the judgment, with costs, and order a new trial.

The other Justices concurred.

CLARK v. DASSO.

John P. Clark v. William Dasso and others.

Highway commissioners: Trees: Removal: Trespass. A highway commissioner who has wantonly sold trees in a highway cannot justify his action, when sued in trespass by the owner, by the statute (*Comp. L. 1871, § 1317*) authorizing him under certain circumstances to order the removal of trees from the highway.

Highways: Shade trees: Obstructions. The policy of our laws favors the planting and preservation of shade trees in the public streets where they do not constitute actual obstructions.

Trees: Highways: Removal: Adjacent owner. Trees in the highway are the property of the adjacent owner; and if they encroach upon the highway and must be removed, he has a right, and must be afforded reasonable opportunity, to take them as living trees and transplant them elsewhere.

Highway commissioner: Removing trees: Justification. A highway commissioner who acts upon his own judgment in removing trees, instead of instituting a prosecution, must take such risk as there may be of a jury differing with him in opinion in case he is prosecuted; and he should be prepared to justify his action, not upon his belief merely, but upon the actual fact.

Heard April 13. Decided April 30.

Error to Wayne Circuit.

Jackson & Wisner, for plaintiff in error.

Henry M. Cheever, for defendants in error.

COOLEY, CH. J:

This was an action of trespass brought for the cutting and carrying away of certain shade trees which had been preserved by the plaintiff in a certain avenue fronting his premises in the township of Springwells. The avenue was seventy feet in width. There were sixteen of the trees, two of which stood near the center of the avenue, with a traveled road on each side, and the majority of the others stood within ten feet of the fence bordering the avenue. The defendant Hynes was highway commissioner. He testified that one Barkham, a resident of the town, told him "that the trees ought to be cut down; that they were not the

CLARK v. DASSO.

thing to have in a street; that we were not living in a country where we had to make woods out of a highway, and that they ought to be cut away." Acting on this suggestion, the commissioner proceeded to sell the trees to defendant Dasso, for sixteen dollars, and the latter cut them and appropriated them to his own use.

The street commissioner justifies his action under § 1317 of the *Compiled Laws*, which reads as follows:

"Any person who shall (except as hereinafter provided) willfully injure, deface, tear, or destroy any tree or shrub thus planted along the margin of the highway, or purposely left there for shade or ornament, shall forfeit a sum not less than five nor more than one hundred dollars for each offense, which sum may be recovered in any court of competent jurisdiction: *Provided*, That whenever it shall appear to the board of commissioners for highways in any town in this state, that any shade or ornamental trees or shrubs are an obstruction or an injury to any highway, said trees or shrubs may be cut down and removed by order of the aforesaid board of commissioners of highways."

It seems hardly necessary to say that the commissioner has not acted under this section. He has found some shade trees belonging to the plaintiff standing in the highway, and he has proceeded to sell them. For this he will find no authority whatever in the statute. Being prosecuted for this action which he had no right to take, he falls back upon what he might have done, but which he has not attempted. Selling a tree is a very different thing from ordering its removal. The attempted justification therefore fails entirely.

We might leave this case here, but the danger that similar wrongs may be committed in other cases seems to justify further remark. The policy of our laws, as is clearly indicated by the statute already quoted, favors the planting and preservation of shade trees in the public streets where they do not constitute actual obstructions. Undoubtedly there must be some officer clothed with authority to protect

CLARK v. DASSO.

the highways against the excessive planting or the improper location of trees, and the commissioner of highways is a very suitable officer to be entrusted with this authority in the townships. But where he is authorized to order the removal of shade trees, it is a great mistake to assume that he may exercise his power in a wanton or reckless manner with impunity. Certain principles must always govern the action of these officers, if they are to keep within the protection of the law. In the first place, the policy of the law is to be considered, which would be wholly defeated if one had no better protection for his shade trees than the whim or caprice of successive commissioners, any one of whom might destroy in an hour all that had been accomplished in many years. Then again, it is to be remembered that the trees are the property of the adjacent owner, who cannot lawfully be deprived of any species of property in the summary mode which was adopted in this case. If the trees must be removed, he may prefer to take them as living trees and transplant them elsewhere; perhaps in more suitable localities in the street, and he should not be compelled to cut them down where removal is preferred. The order of removal should therefore be given to him, and he should be allowed a reasonable time to comply with it before the commissioner should act further.

But it should also be borne in mind that a tree in the highway is not, under our law, *per se* a nuisance, and that it only becomes such when it constitutes an actual injury or obstruction. When the commissioner proceeds to cause a man's shade tree to be removed, he is destroying or injuring the value of private property, and he should be prepared to justify his action, not upon his belief merely, but upon the actual fact. Every man is entitled to a trial of property rights, and if the commissioner acts upon his own judgment instead of instituting a prosecution, he must take such risk as there may be of a jury differing with him in opinion in case he is prosecuted. This is a very just and proper rule, and absolutely necessary to the proper protec-

CLARK v. DASSO.

tion of private rights in cases where a single wanton or heedless act might cause lasting injury.

The cutting of the trees in this case was entirely regardless of plaintiff's rights. It is not shown that plaintiff could not have been notified, but the trouble was not taken to inform him of what was proposed. The complaint which set the commissioner in motion came from a person who evidently had no sympathy with the purpose of the statute, and who desired the trees cut down because of the very shade for which the statute encourages their planting and preservation. And why trees within ten feet of the margin of a seventy feet avenue should be cut down as obstructions is certainly not explained to our satisfaction on this record. It is possible that reasons may exist which are not here set forth; but as the case is here exhibited, the destruction would seem to have been a very wanton and unjustifiable act.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

The Finley Shoe & Leather Company v. John M. Kurtz.

Corporations: Increase of capital stock: Corporate officer. It is not within the implied powers of any corporate officer to obligate the corporation to an increase of the capital stock by an agreement with an employe that he should receive stock in payment for his services, when the corporation held no stock.

Increase of capital stock. The law permits an increase of capital stock only by the body of corporators specially convened for the purpose; that which the law prohibits directly may not be done indirectly.

Corporations: Stockholders: Individual action. An undertaking by all the stockholders severally on its behalf does not bind the corporation; where joint action is required by law, individual action is of no avail.

FINLEY SHOE & LEATHER COMPANY v. KURTZ.

Contracts: Mutuality: Corporate action. There can be no contract without mutuality; and a corporation can only be bound by corporate action.

Submitted on briefs April 14. Decided April 20.

Error to Superior Court of Detroit.

Walker & Kent, for plaintiff in error.

Otto Kirchner, for defendant in error.

COOLEY, CH. J.:

The plaintiff in error is a manufacturing corporation doing business in the city of Detroit. It was organized under the general law providing for the organization of such corporations, and by its articles its capital stock is thirty thousand dollars, which may be increased to one hundred and fifty thousand dollars. Kurtz was in the employ of the corporation and loaned money to it. For this he proposed to take stock, and also for a portion of what he earned by his services. The corporators were only three in number, and one of them informed Kurtz that he had conferred with the others and it was agreed that Kurtz should have stock for what was owing him. The sum was afterwards credited him on the corporate books as payment on stock, but without his direction. In the corporate reports subsequently made to the secretary of state, Kurtz was set down as a stockholder, but of this he had no knowledge. Afterwards Kurtz was discharged from the service of the corporation, and he then brought suit for what was credited to him, refusing to take stock therefor. It appears that the three original stockholders held the whole thirty thousand dollars of stock; that the corporation never took steps to increase the capital to any larger sum, and that no individual stockholder offered to assign to Kurtz any of his stock.

The defense to Kurtz's suit is, that what was due him has by his consent been applied on stock, and that he is entitled to stock therefor and nothing else. To make good

FINLEY SHOE & LEATHER COMPANY v. KURTZ.

this defense the corporation must have shown, *first*, that it had stock to give Kurtz; and, *second*, that there was an agreement on their part that he should have it, and on his part that he would take it.

That the corporation might have had the stock to give Kurtz is undoubted. All that was necessary was that the corporation should increase its capital stock in the manner provided by law, that is to say, by vote of the stockholders at a meeting called for that purpose.—*Comp. L.*, § 2841. Probably by corporate action it might in advance agree to make such increase, and receive money for stock to be issued when the increase should be declared. But it is not very clear that the officers of the company could take action of that nature which would bind the corporators; for if they could, a meeting of the stockholders for the purpose would be a mere ceremony to do that which they could not refuse to do. It certainly could not be within the implied powers of any corporate officer to obligate the corporation to any such increase, and thus indirectly do what the law permits to be done only by the body of corporators specially convened for the purpose.

Taking the case as it stands on the record, it is very manifest that the corporation was never placed under obligation to give Kurtz the stock. Assuming that all the stockholders had severally agreed to it, this agreement bound no one, and might have been repudiated at any corporate meeting. Where joint action is required by law, individual action is of no avail, and at most only puts the individuals under honorary obligations of which the law can take no notice. Suppose Kurtz had demanded the stock when he was discharged, it is clear that the corporation would have had none to give him. Suppose he had sued the corporation for refusal to deliver, where would he have discovered the elements of a contract to that effect? Certainly not in a report to which he was no party, and which was made without his consent or knowledge. Certainly not in the assurances of individual stockholders, when these, so

FINLEY SHOE & LEATHER COMPANY v. KURTZ.

far from binding the corporation, would not even bind themselves individually. The conclusion is inevitable that Kurtz must have failed in such an action, and if so, the corporation must fail in this defense. There can be no contract without mutuality, and a corporation can only be bound by corporate action, and that we look for in vain in this record.

The judgment must be affirmed, with costs.

The other Justices concurred.

Charles V. Whitten and others v. Daniel G. Wright.

Debtor and creditor: Negotiable paper: Collateral security: Failure to protest. One who receives from his debtor, as collateral, negotiable paper of a third person, endorsed by the debtor, if he neglects to protest it for non-payment, thereby makes the paper his own and releases his debtor's endorsement.

Promissory notes: Drafts. There is no distinction, in the applicability of this doctrine, between promissory notes and drafts.

Promissory notes: Failure to protest: Injury: Evidence: Insolvency of maker. Evidence in such case that the endorser suffered no injury from the failure to protest, as the maker was insolvent when the note was given and had been ever since, is incompetent. It is of the utmost importance that no uncertainty should exist as to the rights and liabilities of parties to negotiable paper.

Promissory notes: Value. The value of a note depends not alone upon the solvency of the maker, but equally as much upon his integrity and business habits.

Fraudulent misrepresentations: Evidence. The exclusion of evidence of the insolvency of the maker, and of a letter from defendant to plaintiff concerning his solvency, offered to make out a case of fraudulent misrepresentations, is not error where the offer does not include a proposal also to show that defendant knew the statements in the letter to be untrue.

Promissory notes: Warranty: Issue. Any right of action based upon a warranty by the indorser of the solvency of the maker is not within the issue of an action brought in the ordinary way upon the note.

Heard April 14. Decided April 30.

Error to Van Buren Circuit.

This was an action of assumpsit to recover the purchase price of certain goods sold and delivered by plaintiffs to

WHITTEN v. WRIGHT.

defendant, and upon a promissory note made by A. A. Hough and endorsed by defendant and delivered by the latter to plaintiffs as collateral to the payment of the purchase price of said goods. The plaintiffs failed to protest the note when it fell due. Defendant recovered judgment below, and the plaintiffs brought error.

Richard & Mills, for plaintiffs in error.

Severens, Boudeman & Turner, for defendant in error.

MARSTON, J.:

The arguments in this case were quite elaborate, especially those of counsel for defendant, who also cited a large number of authorities in support of the ruling of the court below. We do not deem it necessary to enter into an extended discussion of the principles involved in this case or to review or attempt to harmonize the authorities cited, as the questions raised must be considered as settled in this state by the previous decisions in *Jennison v. Parker*, 7 Mich., 355, and *Phoenix Ins. Co. v. Allen*, 11 Mich., 501.

A distinction is sought to be created between a failure to protest an endorsed note of a third party, as in this case, and a failure to protest a draft, as in the cases referred to. We can see no good reason for any such distinction. Each are cases of negotiable paper and involve the rights of an endorser to protest and due notice thereof to fix his liability and to enable him to take such steps as he may consider advisable to protect himself.

Upon the trial counsel for plaintiffs offered to show that at the time the note was given the maker was insolvent; also that he was insolvent at the time of its maturity, and continued to be so up to the time of the trial, for the purpose of showing that if the note was not properly protested the defendant lost nothing by it.

It is of the utmost importance that no uncertainty should

WHITTEN v. WRIGHT.

exist as to the rights and liabilities of parties to negotiable paper. Should the introduction of evidence upon the trial be sanctioned, to show that an endorser had not suffered any injury from a want of protest and notice, an element of uncertainty would then exist and the way would be opened for a new class of questions and much needless litigation. The value of a note cannot always be determined from the solvency or insolvency alone of the maker. As was said in *Rose v. Lewis*, 10 Mich., 485, "the value of negotiable paper is well understood not to be absolutely dependent on the amount of property liable to execution which may be possessed by its maker. A very large portion of current securities of undoubted goodness would, under such a test, be worthless. And in cases where a holder of such paper is indebted to the maker, it may be as valuable to him, by way of set-off, as if the maker were wealthy and in sound credit. The value of commercial paper must always depend very much upon the integrity and business habits of those who issue it. And we cannot perceive the justice or good sense of any rule which should disregard the results of common experience." If the note in this case had been properly protested and notice thereof given the defendant, he might have been able to collect it or secure its payment.

We think the evidence offered was properly excluded. This evidence was also offered to show that the plaintiffs were induced to take the note through the fraudulent misrepresentations of the defendant. The court inquired if counsel proposed to show fraud in the transaction. This was not claimed, but merely that the facts stated in the letter of May 16, 1874, written by defendant to the plaintiffs concerning the solvency of the maker of the note, were not true, but whether defendant knew they were or not counsel was not prepared to say.

Under these circumstances the evidence offered was properly excluded. It is now said that the statements referred to were in effect a warranty; that if they turned out to be

WHITTEN v. WRIGHT.

false the warranty was thereby broken and defendant liable thereon. Even if this view were correct, this case was not commenced or tried upon any such theory. The fact of a warranty and breach thereof was not in issue under the pleadings.

As we do not discover any error in the record, the judgment must be affirmed, with costs.

The other Justices concurred.

Christian Reusch v. John Demass.

Replevin bond: Transfer of the cause: Sureties. The sureties on a replevin bond are not discharged by the transfer of the replevin suit from the Wayne circuit to the superior court of Detroit by virtue of the statute.

Submitted on briefs April 14. Decided April 20.

Error to Superior Court of Detroit.

Charles C. Hickey, for plaintiff in error.

Albert J. Chapman, for defendant in error.

CAMPBELL, J:

The only question in this case is, whether a replevin bond ceases to become binding on the sureties where the cause in which it is given is transferred from the Wayne circuit to the superior court of Detroit.

The condition of the bond is, that the plaintiff shall prosecute the cause to effect, and if the defendant recover judgment against him, that he will return the property, if return be adjudged, and pay such sums as defendant may recover against him.

REUSCH v. DEMASS.

As this bond was given after the law came in force which authorized such suits to be transferred, it must be construed to apply to the proceedings in whatever court they may be. A suit in the circuit might become a suit in the superior court at the option of the defendant, and the transfer was as fairly contemplated as any other step in the cause, as a trial by the court or by jury, or a judgment by default, or a continuance by consent.

Every one must be subject to the incidents of the litigation where he assumes the risks of the litigation, wherever they may be. The suit is the same suit in both courts, and the removal is not an extraordinary step, but one which the defendant was expressly empowered to take if he saw fit.

We can see no ground on which it can fairly be assumed the risk was to cease before final judgment. The plaintiff is not allowed to select his own forum without giving the defendant a voice in the matter, and his sureties, who enable him to get possession of the defendant's property, are not authorized to separate their responsibility from his. The suit is not prosecuted to effect until it is terminated wherever the law places it, and there can be no judgment or recovery except where the suit is found pending.—See *Comyn's Digest*, "*Replevin*" D; *Gwillim v. Holbrook*, 1 Bos. & P., 410.

We think the court erred in holding the sureties discharged. The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

CARPENTER v. BUTTERFIELD.

Thomas J. Carpenter v. Leander S. Butterfield and another.

Goods sold and delivered: Evidence: Common counts. In an action upon the common count for goods sold and delivered, evidence that defendant and three others executed a written proposal to buy of plaintiffs a printing press and material to a specified amount, to be selected by a third person, each to pay one-fourth, with the understanding that such third person should take the offer to plaintiffs, who were to execute it in duplicate and return one copy, and that the goods were to be shipped to the purchasers, who were to pass them over to such third party on his giving them a mortgage on these goods and other property to secure the purchase price, but that plaintiffs on receiving such instrument, without executing any duplicate and without notice to defendant or his associates, shipped to said third party direct such goods as he selected and exceeding in amount the limit specified, and that the latter never executed the mortgage agreed upon,—will not warrant a recovery.

Evidence: Goods sold and delivered. Subsequent negotiations between the parties for a compromise or an adjustment are held not to have given rise to any liability on the part of the defendant capable of enforcement under the count for goods sold and delivered, if at all.

Submitted on briefs April 14. Decided April 20.

Error to Superior Court of Detroit.

Hoyt Post and Ashley Pond, for plaintiff in error.

Moore & Griffin and F. A. Baker, for defendants in error.

GRAVES, J:

The jury should have been instructed to find for defendant below, as requested.

The action was on the general count for goods sold and delivered, and there was no evidence of any sale and delivery to Carpenter, or of any state of facts to make him responsible in that form.

The grounds of this remedy have been frequently explained by the court, and it would be a waste of time to enter into an extended exposition of the facts in the present record to demonstrate their unfitness to support a count for goods sold and delivered as between these parties. Carpenter and three others offered to buy on certain terms a press and

CARPENTER v. BUTTERFIELD.

material, to be selected by Bartram, and up to fifteen hundred dollars, the goods to be delivered to them at Midland City. The offer was made in the form of a written agreement signed by Carpenter and his associates, and to be signed by or on the part of the Detroit Paper Company in case it should be accepted. And a copy executed by the paper company was to be returned to one of Carpenter's associates, and by an arrangement between the latter and Bartram the property, if purchased, was, after its receipt from the company by the purchasers, to be passed over to Bartram, on his giving a mortgage on it and on all the material in the Midland Times office to secure the payments in the agreement.

Whilst this proposed agreement provided that each vendee should be responsible only for one-quarter of the price, it contemplated at the same time that the sale and delivery should be entire to the vendees. Bartram carried the offer to the company, and specified what he wanted. He bargained at the same time for more goods to a considerable amount. The company could not fill his order without sending abroad, and could only furnish a press worth three hundred dollars. He then bargained with the company to obtain and send from time to time the articles he specified, and agreed to take the small press with the understanding that the company would soon exchange and give him one costing nine hundred dollars in room of it. The company went on to fill up the bill. The small press was put in at three hundred dollars, and other things were added in the course of a few months; but in fact the whole amounted to a good deal more than fifteen hundred dollars. The company claim, however, that the bill chargeable to Carpenter and his associates only exceeded that amount by a few cents. Butterfield swears these goods were sold on the contract to Bartram. They were all charged to Bartram in the company books. They were all delivered to him. None of them ever went into the possession of Carpenter and his associates, or either of them. Within a week the

CARPENTER v. BUTTERFIELD.

small press, rated at three hundred dollars in the fifteen hundred dollar purchase, was exchanged by the company for one at nine hundred dollars, pursuant to the arrangement they had made with Bartram in the first place.' No duplicate of the offered agreement was executed by the company and forwarded to Carpenter or any of his associates, and Bartram never gave, or offered to give, the mortgage provided for.

The evidence in regard to subsequent negotiations does not tend to prove any new transaction of a kind to fix Carpenter with a liability for goods sold and delivered to him by the paper company, and if in the events that happened he actually incurred any liability to the paper company, it was not one capable of enforcement under a count for goods sold and delivered.—2 *Saund. P. & Ev.*, 533, et seq.; *Exchg. Bank of St. Louis v. Rice*, 107 *Mass.*, 37; *Metc. on Con.*, 18.

The judgment should be reversed, with costs, and a new trial ordered.

The other Justices concurred.

Peter Voorhees v. Henry C. Sessions.

Register in chancery: Money paid into court: Official custody: Garnishment.

A register in chancery with whom in his official character money has been deposited under an order of the court by a receiver, cannot be made liable on account thereof as garnishee of the parties to whom the money so deposited lawfully belongs, though the proceedings under which the money was paid in have long since been dismissed and determined; the money would still remain in the custody and subject to the control of the court, and its possession by the register would still be in his official capacity.

Heard April 14. Decided April 20.

Error to Ionia Circuit.

VOORHEES v. SESSIONS.

Voorhees instituted garnishee proceedings in the court below against Sessions to reach moneys in his hands claimed to belong to the principal defendants, Sutherland, Perrine and Frazell. It appeared from the disclosure that the money sought to be reached had been deposited with Sessions as register in chancery in pursuance of an order of the court by the receiver in a suit instituted to wind up a copartnership before existing between the principal defendants. The bill of complaint in this chancery suit was dismissed for want of prosecution, August 26, 1872, and no further steps or proceedings have since been taken therein. The court below rendered judgment in favor of the garnishee defendant, and the plaintiff brings error.

Mitchel & Pratt, for plaintiff in error.

No counsel appeared for defendant in error.

MARSTON, J:

Although it appears that the bill of complaint in the cause wherein Sutherland, Perrine and Frazell were parties has long since been dismissed, nevertheless there are very serious difficulties in the way of permitting Sessions to be held responsible in this form of action. The money was paid into a court of chancery under an order thereof pending litigation therein. Sessions was register in that court. He received, held and retained the money in his official character as such officer, without any control over, or power of disposing of it, except for safe keeping, unless by order of the court.

A termination of the chancery proceedings under which the money was paid in, did not necessarily withdraw it from the control of the court. It still remained in its custody and subject to its disposal, and Sessions continued to hold it in his official capacity and character, and in none other. He and his sureties were and remained liable upon his official bond for the proper payment of this money according to

VOORHEES v. SESSIONS.

any order the court might make regarding it. Under such circumstances he cannot be held responsible as garnishee. To permit this would be to sanction conflicting orders and judgments of different courts regarding the disposition of the same fund. And we would frequently have judgments of courts of inferior jurisdiction disposing of funds in the custody and control of the circuit courts. Indeed, there are many, and to us conclusive reasons why money thus paid into court should remain there subject only to the order of that court, where all the parties interested can be present by their respective counsel and be heard, as they would be upon motion to dispose of it.

Upon this question our statute seems to be clear and decisive, that no person shall be adjudged a garnishee "by reason of any money in his hands as a public officer, for which he is accountable merely as such officer to the principal defendant."—*Comp. L.*, § 6503, *sub. 2*.

The judgment must be affirmed, with costs.

The other Justices concurred.

Goodwin S. Tolles v. Stephen W. Duncombe.

Trespass to lands: Constructive possession: Tax-titles held by third persons. In an action of trespass to lands, where the plaintiff is not in actual possession, but bases his right upon the legal title and the constructive possession claimed to be drawn therefrom, evidence of tax titles held by third persons is admissible, such titles being *prima facie* paramount, and therefore, unless overcome, defeating plaintiff's right of action.

Heard April 14. Decided April 20.

Error to Van Buren Circuit.

Severens, Boudeman & Turner, for plaintiff in error, were stopped by the court.

Richards & Mills, for defendant in error.

TOLLES v. DUNCOMBE.

CAMPBELL, J:

In this case, which was an action of trespass to lands, the plaintiff below showed no actual possession, and based his right to sue upon a legal title and the constructive possession claimed to be drawn from it.

The defendant below having introduced certain tax-deeds in favor of third persons, they were afterwards stricken out as not admissible, apparently because defendant showed no privity with the holders.

This was clearly erroneous. Any thing which showed plaintiff had no title would defeat his action, which was based purely on ownership. A tax title is *prima facie* evidence of paramount title, and until overcome by proof must prevail. If the tax titles were good the plaintiff had no title, and not being disturbed in any actual possession, he had nothing to complain of.

The judgment below must be reversed, with costs, and a new trial granted.

The other Justices concurred.

Alexander R. Linn and another v. William E. Howell and another.

Charge to the jury: Immaterial matters. Instructions given in this case in response to an inquiry of the jury after they had retired for a time and returned into court again, are held to have been misleading and erroneous, in that they gave to a portion of the evidence on an immaterial matter a weight and influence to which it was not entitled.

Fraudulent purchase: Immaterial questions. In an action to charge defendants for the price of goods delivered to and disposed of by them, upon the ground that it was fraudulently contrived that the third person through whom the goods were obtained of plaintiffs should purchase them ostensibly for another firm, but secretly and really for the defendants, and that the purchase was so made, the right of recovery cannot

LINN v. HOWELL.

properly be made to turn upon directions given by defendants to such third person to abstain from making a purchase in their name on credit.

Submitted on briefs April 14. Decided April 20.

Error to Cheboygan Circuit.

Atkinson & Atkinson, W. S. Humphrey and G. W. Bell,
for plaintiffs in error.

James J. Brown, for defendants in error.

GRAVES, J :

Previous to 1873 Vorce, Barker & Co. were carrying on a lumber business at Cheboygan, and up to November of that year the firm had kept a small stock of goods near their mill to accommodate the persons in their service.

Mrs. Vorce is the wife of the member of the firm of that name, and Howell is her brother. Howell held a note against the firm for six hundred dollars, and in the spring of 1874 Mr. Vorce left Cheboygan for Buffalo, and it was arranged between him and defendants that he should endeavor to get the money called for by the note, of the partners of the firm in Buffalo, and should also obtain five hundred dollars of the father of Mrs. Vorce on mortgage of certain lands which Howell had deeded to her, and that with this money and the proceeds of the note he should during his return purchase a stock of goods for defendants.

He obtained the five hundred dollars, but failed to get any thing on the note. On reaching Detroit in the course of his return he bought goods of the plaintiffs to the amount of thirteen hundred dollars and paid over the five hundred dollars. At the same time he bought a bill of another house and the claim was assigned to plaintiffs. These purchases were made in the name of the old firm of Vorce, Barker & Co. and not in the name of the defendants, and they were upon credit except as to the amount of five hundred dollars which had been raised by mortgage of Mrs. Vorce's land. The two bills were shipped nominally

LINN v. HOWELL.

to the firm at Cheboygan, but on arrival there they were taken directly to the store of the defendants and thereafter disposed of precisely as though defendants owned them. Thereafter the defendants ordered goods from time to time as they desired them, but in so doing used the name of the old firm. They also made payments in the same style.

There was evidence tending to show that Vorce's partners were not aware the firm name was being used in this way, and also that when the goods were bought the firm was embarrassed. There was also evidence tending to show that the defendants were carrying on the business in their own name and without connection with the firm of Vorce, Barker & Co., and that Vorce was instructed to buy for cash only, and in case he did not get the six hundred dollars to make no purchases on credit.

There was evidence for defendants tending to show a special arrangement between them and Vorce for the supply and disposal of goods.

There was likewise evidence that the old firm had not dealt in merchandise later than the fall of 1873, and had not so dealt subsequent to the purchases in question, and that shortly after such purchases the old firm made an assignment for the benefit of creditors.

It is not important to refer to all the evidence.

After the first retirement of the jury they came back into court and inquired whether if Vorce was instructed by defendants to buy for cash, and he bought partly for cash and partly on credit, he thereby ceased to be their agent. And the judge replied that he would in such case cease to be their agent, if so being instructed by Howell, he purchased on credit in the name of the firm of Vorce, Barker & Co.; and that they, the jury, should consider all before them in reference to the question.

It appears to me the charge which had been given before the retirement of the jury was fair and distinct, and suited to the state of facts which the evidence seems to have disclosed.

But the answer given by the judge to the question stated

LINN V. HOWELL.

by the jury appears to me to have been liable to lead them to give weight and influence to a portion of the evidence to which it was not entitled, and to depart from the line of consideration which the principal charge had properly marked out.

The evidence tended to show that Vorce made the purchase in the name of the old firm and not in the name of the defendants, and hence not at all ostensibly as defendants' agent, and that the sellers of the goods were not aware that he was acting or assumed to act for the benefit of the defendants. The fact, if it was a fact, that he was secretly but actually buying for the defendants, and not for the firm, could have had no influence or imposed any duty upon the sellers at the time, because they had no knowledge of such a state of things. And as he was not acting ostensibly as defendants' agent, any condition which they had imposed upon his right to buy for them was irrelevant, since the plaintiff did not rely upon his having appeared to act or upon their supposing him to be acting as the defendants' agent. The plaintiffs made no claim upon any such ground. Their position, as well as that of the defendants, was well stated in the main charge. They maintained that it was fraudulently contrived that Vorce should purchase ostensibly for the old firm, which was irresponsible, but secretly and really for the defendants, that the purchase was so made, the sellers supposing they were treating with the old firm, whilst, in point of fact, the purchase was for the benefit of defendants, who received the goods and disposed of them for their own use. And this is the basis of the action, and I do not see how it can be made to turn upon an instruction by defendants to Vorce to abstain from making a purchase in their name on credit.

If correct in this, the judgment should be reversed and a new trial ordered, with costs.

The other Justices concurred.

WILLETT v. SHEPARD.

Gordon A. Willett and another v. Oliver C. Shepard.

Promissory notes: Alteration: Burden of proof. In an action upon a promissory note, where the only controversy relates to whether an erasure of the words "after due" in the printed form, following the rate of interest, was made after or before the execution of the note, and evidence has been introduced both pro and con on this subject, it is error to charge the jury that the burden of proof on this question is upon the defendant; on the contrary, the burden of proof is on the plaintiff to show that the note in the shape in which he produces it and has declared upon it was in fact executed and delivered by the defendant.

Heard April 14. Decided April 30.

Error to Ionia Circuit.

Wells & Morse, for plaintiffs in error.

Mitchel & Pratt, for defendant in error.

GRAVES, J :

The defendant in error brought his action to recover of plaintiffs in error the amount of a promissory note.

The declaration was on the common counts, and a copy of the note was appended.

It purported to have been given on ten months' time, and to call for interest from its date at the rate of ten per cent.

The plaintiffs in error pleaded the general issue, and an affidavit denied the execution of the note.

At the trial, on being produced, it appeared to have been drawn by filling up a printed blank, and the printed part called for "ten per cent. interest after due, value received," but the printed words "after due" were seen to have been erased at some time.

The note being offered in evidence, it was admitted that the signature was genuine. And it was conceded that the paper might be given in evidence to the jury, but not as

WILLETT V. SHEPARD.

showing that it was executed with the words "after due" struck out. It was accordingly admitted, and the defendant in error rested.

Thereupon the plaintiffs in error went into evidence to prove that the words in question were in when the note was given and had been fraudulently erased since, and the defendant in error gave evidence to the contrary.

In charging the jury the judge told them the burden of proof was upon the plaintiffs in error upon the point in controversy, and the jury upheld the note; and this ruling presents the only question in the cause.

The form in which the defendant in error chose to assert his cause of action is of no consequence. The same principle must govern in reference to such a question as we have here, whether the declaration is on the common counts or is framed specially upon the contract. He sued to recover on the note as it appeared in evidence, and in substance and effect he alleged that the plaintiffs in error made and delivered it in the shape it now bears. As the plea denied this, he was put to the proof of his allegations. He held the affirmative and was required to support it or be defeated.

On the concession that the signature was genuine, the note was properly admitted in evidence.—*Hunter v. Parsons*, 22 Mich., 96. And the bare fact of the erasure, raised no legal presumption that the words "after due" in the printed form had been obliterated after execution.—*Comstock v. Smith*, 26 Mich., 306. At this stage of the case therefore, and whilst there was no opposing evidence, the note could not be held invalidated by the circumstance that it was seen the particular printed words of the blank had at some time been erased, and it was properly to be regarded as affording sufficient inferential and presumptive evidence in support of the allegation of the defendant in error to constitute a *prima facie* case in his favor.

When, however, the plaintiffs in error went into general evidence to controvert the case of the defendant in error and prove the alteration fraudulent, the issue depended no

WILLETT V. SHEPARD.

longer upon the presumptions which are rightly indulged where there is no legal dispute; but the question was then to be contested upon relevant facts and circumstances and decided by the jury according to the weight of evidence.—*Hunter v. Parsons, supra.*

Still there was no shifting of the burden of proof.

The controversy began with the claim made by defendant in error, that the note in substance and effect, as it now appears, was made by the plaintiffs in error, and this the latter denied; and on this issue, and with the parties in these relative positions, the litigation has invariably proceeded. There has never been any change. It was incumbent on defendant in error in every stage to maintain his side of that issue by a preponderance of evidence.—*Atwood v. Cornwall, 25 Mich., 142.* He could not claim a verdict otherwise.

The circumstance that there was no dispute about any of the parts or elements of the case laid and alleged by the defendant in error, except the particular in question, makes no difference. That particular is included in the charge brought by the defendant in error and his whole case turns upon it. A failure to sustain his side of the issue in regard to that, would carry with it his entire allegation. Having the affirmative in regard to the whole, he has it likewise in regard to every part of that whole.

The conclusion is, that the judge mistook the rule of law when he told the jury that the burden of proof was on the plaintiffs in error, in regard to the erasure of the words "after due," and therefore the judgment should be reversed, with costs, and a new trial ordered.

The other Justices concurred.

ANDERSON v. RUSSELL.

William Anderson v. Edward L. Russell.

Estates of deceased persons: Claims: Administrator: Evidence. The fact that an administrator on the hearing of a claim before the commissioners did not take the stand to contradict the testimony of the claimant, is not one from which inferences can safely be drawn against the estate.

Estates of deceased persons: Claims: Evidence. On the hearing of a claim presented against an estate where the question in dispute is whether the deceased had, just before his death, borrowed the amount of two notes produced, or whether, on the other hand, one of them represented a sum which was afterwards included in the other, much latitude of examination is allowable, within the discretion of the trial court, into circumstances that would tend to throw light upon the controversy, such as the amount of money the deceased received or had at about the time alleged.

Evidence: Corroboration. A party cannot support his positive testimony of facts stated upon his own knowledge by testifying himself to other consistent or corroborative facts that are immaterial in themselves, and which, like the facts sought to be corroborated, rest entirely upon his own oath.

Heard April 19. Decided April 20.

Error to Lenawee Circuit.

The matter in controversy in this case relates to a claim of the plaintiff in error against the estate of Edwin J. Bryan, deceased, of which defendant in error is administrator. The claim was upon two promissory notes and a small account. The commissioners on claims allowed the amount of one of the notes and the account, and disallowed the amount of the other note. The claimant appealed, and upon the trial in the circuit the jury reached the same result as the commissioners did. The claimant brought error.

A. L. Millard, for plaintiff in error.

Stacy & Underwood and *Walker & Weaver*, for defendant in error.

COOLEY, CH. J:

We are not satisfied that any error was committed on the trial of this cause.

ANDERSON v. RUSSELL.

The fact that the administrator did not put himself upon the stand on the hearing before the commissioners, to contradict the testimony of the claimants, is not one from which inferences can safely be drawn against the estate. Many things might influence the administrator in abstaining from being sworn. It would usually be reason sufficient that the claimant's case, as it then stood, was so weak that the commissioners must reject his claim; and that may have been the administrator's opinion in this case. The result demonstrated that his testimony would have been of no importance, and we may as fairly attribute his abstaining from taking the stand to a conviction that it was unnecessary as to any other cause. Parties are usually quite excusable in abstaining from giving their own evidence if they deem it not absolutely essential, because interest always does and must subject it to more or less suspicion. And while this fact should be of slight weight when one sues in a representative character, we cannot say that one may not with propriety defer to it where he thinks he can do so without prejudice to the interests he represents.

The latitude of examination that was allowed in the case of Mrs. Bryan and Mr. Russell was fairly, we think, within the discretion of the court. The question in dispute was, whether the intestate had borrowed the sums, represented by the two notes, just before his death, or whether, on the other hand, one of the notes represented a sum which was afterwards included in the other. There was no possible method of meeting the complainant's case, if it was untrue, except by the circumstances which would tend to show that the intestate received no such money at about the time alleged, and others of similar nature. It is difficult to draw any exact lines in such cases; the parties ought to be allowed large liberty in bringing forward circumstances which could fairly throw light upon the controversy; especially as the estate is placed at great disadvantage in not having the explanations of the intestate as guides in developing the facts. We do not think there was any abuse of discretion in this case.

ANDERSON v. RUSSELL.

Nor was there error in ruling out the questions put to the plaintiff concerning his continuous possession of the disputed note, and the amount of money he had at the dates of the two notes respectively. The facts it was sought to bring out were not material, and the purpose of the questions could only have been to support evidence the plaintiff had already given by proving other consistent facts. Such evidence coming from other persons might have had some such tendency; but when the question is whether one fact to which a witness testifies is correct, it can receive no support whatever from his swearing to another which, though consistent with the first, must, like that, rest entirely upon *his own statement*.

The judgment must be affirmed, with costs.

The other Justices concurred.

JUNE TERM, 1876.

John Anderson and others v. Moses Walter.

Promissory notes: Rule 79: Denying execution: Affidavit. An affidavit under rule 79, which, while admitting the signature to the note declared upon appeared to be defendant's genuine signature, avers that the same was obtained under circumstances, fully set forth, which would render him not liable thereon, is held sufficient to put the plaintiff to the proof of the execution and delivery of the note sued upon.

Fraud: Evidence: Cross-examination. Where the defense of fraud is set up, a wide latitude should be allowed upon the cross-examination of a witness who was a participant in the transaction, and much must be left to the discretion of the trial court.

Charge to the jury: Construction: Repetitions. The charge to the jury must be considered and construed as a whole, in the same connected way in which it was given, and upon the assumption that the jury did not overlook any portion, but gave due and equal weight to every part; and where the effect of defendant's negligence in signing papers has been once clearly and properly stated, it is not necessary to incorporate and repeat that instruction with every other portion of the charge upon which it has any bearing, unless it is apparent that otherwise the jury might be misled.

Promissory notes: Negligence in executing and putting in circulation: Good faith. While there may be cases where one signing and putting in circulation an instrument should be bound by the terms thereof, even though it turned out different from what he supposed it to be, this rule does not go so far as to require a party signing in good faith what he has heard read, and what purports to be a power of attorney, contract, deed, mortgage, or similar instrument, to be held liable in case a negotiable note of that date, of which he had no notice or intimation, should have been mysteriously lurking in the depths of the instrument so signed, and should afterwards turn up with his signature attached to it.

Promissory notes: Negligence: Charge to the jury. In an action upon a promissory note, where the evidence on plaintiff's behalf tends to show that defendant knowingly and deliberately signed and delivered the note at the same time that he executed two other papers, and that on defendant's behalf, that only the two other papers, duplicate agency contracts, were executed or mentioned or read to him, and that there was no talk of a note, and no note shown or signed, there is no basis for presenting to the consideration of the jury the question of the effect of defendant's negligence in signing and putting in circulation the note in question.

ANDERSON v. WALTER.

Contracts: Negligence in executing: Comparison. Where a party to an instrument undertakes to read it over in the presence and hearing of the other party thereto, in order that he may understand its contents before signing it, the party reading is both legally and morally bound to read it correctly, and the other interested party has a right to rely upon its being so read, and is not guilty of negligence in signing it without further examination.

Heard April 6 and 7. Decided June 8.

Error to St. Joseph Circuit.

Upton & Thompson, for plaintiffs in error.

H. H. Riley, for defendant in error.

MARSTON, J:

Plaintiffs in error, claiming to be *bona fide* holders of a negotiable promissory note executed by the defendant, brought an action of assumpsit to recover the amount thereof. The defendant pleaded the general issue, and filed therewith an affidavit setting forth that the signature to the note declared upon he believed to be his, but that the same was procured under circumstances, fully set forth, which would render him not liable thereon.

Upon the trial, after plaintiffs had introduced evidence tending to show that they were *bona fide* holders, which was not disputed, the defendant offered evidence tending to show that he never signed the note. This was objected to as irrelevant and immaterial, and also because the defendant, in the affidavit attached to his plea, had not denied its execution. This latter objection was made and overruled several times during the progress of the trial, and indeed forms the basis for most of the plaintiffs' exceptions.

As was said in *McCormick v. Bay City*, 23 Mich., 457, "We do not think an affidavit of this kind should be subjected to any very technical rules of construction. If it appears that a defendant means to contest the execution or delivery in good faith, any legal questions concerning the sufficiency of the defense should be reserved for the trial,

ANDERSON v. WALTER.

when the facts could all be presented. It never was designed that a defendant should be compelled in his affidavit to state every fact, but merely to indicate his defense or to make a plain denial." Tested by this rule, the affidavit in this case could not be treated as an admission of valid execution. A defendant cannot be required to swear that the signature appearing upon an instrument is not his genuine signature in order to deny the execution. The signature may be genuine, and yet the instrument a forgery. In such a case he could not deny the signature under oath. He would admit it, but set up facts from which it would appear that he was not bound by, or ever executed the instrument sued upon. We think the denial in this case was sufficient, and it will not be necessary to consider this question again in reference to the modifications of plaintiffs' requests to charge, which assumed the contrary.

The court permitted defendant's counsel, upon cross-examination of plaintiffs' witness Simons, to inquire of him respecting what took place the next day between Kimball, the payee of the note, and other parties concerning similar transactions. Simons had testified that he was present at the time the note in question was executed and delivered by defendant to Kimball, and that he was there as the agent or servant of Kimball. The defense claimed that the signature to the note, if signed at all by the defendant, was obtained under false and fraudulent circumstances, and that Simons was a party to the fraudulent transaction. As tending to show this, and for the purpose of affecting his credibility as a witness, they made these inquiries. In cases of this kind a very wide latitude should be allowed upon cross-examination. Much must be left to the discretion of the trial judge. We think the inquiry was pertinent and proper to go before the jury to be considered by them in weighing Simon's testimony.—*Bissell v. Starr*, 32 Mich., 297.

The most important questions yet remain to be considered. The execution of the note having been denied, plain-

ANDERSON V. WALTER.

tiffs introduced evidence tending to show that defendant did sign it, and they claimed that even if he did not knowingly and willingly sign the note, yet that he was guilty of such negligence in signing it that they as *bona fide* holders were entitled to recover. In order to fully understand and appreciate the charge of the court as given, and the refusals to charge complained of, it becomes necessary to quote at some length the evidence given in the case bearing upon the question of execution. Two witnesses only were examined upon this branch of the case: one, the defendant; the other, J. W. Simons, who was present with Kimball at the time, as claimed, the note was signed by the defendant.

There was no dispute but that on the day the note purported to have been executed, F. M. Kimball, accompanied by Simons, visited defendant at his residence; that Kimball sought to and did induce defendant to agree to act as an agent for the sale of a sulky wheel cultivator, and that an agreement in duplicate to that effect was then signed by both Kimball and defendant, each retaining a copy.

Defendant testified, after speaking of the inducements held out to him to become an agent: "I finally said, I will take the agency, if it wouldn't be any thing out of my pocket at all, and do what I could; if I could sell any it was good, and if I couldn't it was good, and so at last I agreed to go agent; and I asked him how long the agency should last, and he said from one year to ten,—I could throw it up any time I had a mind to. So at last I consented, and he went to filling out them two papers. He took them out of a satchel, I believe. The paper now shown me is one of them that I signed. After he took the papers out he gave me one. I am a poor scholar. I can read the writing. I can read this here. And he told me I should follow him, and he commenced reading, and he read so fast that I couldn't keep up. I was standing there; Simons was in the buggy. * * * I would not like to tell you that he read the instrument through; I couldn't tell you, he read so fast. I am a poor scholar. I can't

ANDERSON v. WALTER.

read it. * * I signed it out there in the road. I had a corn basket, and I think I laid both the papers down on it at a time and signed them; nothing on the corn basket but the two papers, and I signed them out there on the cover of the corn basket. After the signature to the two papers was made by me he read them again. He wanted me to look for him, and he read the other to see if they would correspond. He held one and I held the other one. * * I saw no such note as the one now shown me at that time. I never signed that note knowing it to be a note; never showed me a note to sign. I signed nothing only the two papers. * * * There was nothing said during that conversation between me and Mr. Kimball about a promissory note. * * * Kimball said nothing to me about security. I signed only two times. The signature to the note in suit shown me is similar to my handwriting, but I never signed that note. It was never presented to me."

Simons testified: "I know defendant; have seen note in suit before; first saw it on the day it was given. I saw it signed and executed. Mr. Walter signed it. I was sitting in a buggy in front of his house at the time. It was in a small note book when he signed it. * * 'The note was dated on the day it was signed. I saw Moses Walter sign three papers,—two agency papers,—and one he kept and one Mr. Kimball kept. This note was executed there in a book. The agency papers were signed first. * * * He (Walter) spoke of several neighbors who thought of getting cultivators, and he thought he could sell them some, and he finally concluded that he would take the agency, and Mr. Kimball went on and drew up the agency papers, and also the note in the note book. Mr. Walter signed the agency papers, and also the note in the note book. Mr. Walter signed the agency papers, and Mr. Kimball handed him the note book, and Mr. Walter read it, or a portion of it. He continued to read it, but some words he could not make out very distinctly, and Mr. Kimball assisted him in reading

ANDERSON v. WALTER.

the note and Mr. Walter signed it. * * Before he signed the note Mr. Kimball took out his note book and said he always took a note for two hundred dollars. Mr. Walter said he thought the first year he could pay his note by the machines he would sell."

It will thus be seen that the tendency of this evidence leads in but two directions. If Simons was correct, there could be no question but the note was genuine and that defendant was liable; while if defendant's testimony was true, the note was simply and purely a forgery. There was no middle ground. If, as defendant testified, he signed but two papers, viz.: duplicates of the instrument appointing him agent, and that he saw no note and signed no note, it would be difficult to get up any sound theory upon which the plaintiffs would be entitled to recover. As the testimony stood no dispute could, and none did arise, as to what the charge should have been, assuming Simons' testimony to be true. The only ground upon which plaintiffs' counsel claimed the right to recover, in case the jury found defendant's testimony to be true was, that he admitted signing a paper, viz.: the duplicate agency agreement, and which in the affidavit attached to his plea was called a bond, by which he obligated and intended to bind himself to pay two hundred dollars, and which he thus put in circulation voluntarily; and the fact that it turned out to be a different obligation from the one he supposed it to be, was no defense as against plaintiffs. Such being the testimony and theory of counsel, the court upon this part of the case charged the jury, under plaintiffs' sixth request as modified: "If the defendant was guilty of negligence in signing the note, if you find he did sign it, and had ample means or good reason to know that he was signing a note at the time he subscribed his name to the note in question, the plaintiffs are entitled to recover." And at defendant's request the court charged:

1. "The defendant Walter is sued in this case upon a promissory note, which, it is claimed by the plaintiffs,

ANDERSON v. WALTER.

he signed and delivered as a note. If it appears from the evidence that Walter did not know he was signing the note when it is claimed that his signature thereto was obtained, he cannot be held liable upon it, provided he was guilty of no negligence in signing it."

2. "If Walter never bargained to sign the note, or to give a note, and did not suppose or believe he signed such an instrument, but was in fact only to sign the other papers he had heard read, and believed he had only signed them, the note is void in the hands of the present holders, and the plaintiffs cannot recover upon it."

From this it will be seen that the court in the sixth request of counsel for plaintiffs, and the first for defendant, as given, clearly, and as favorably as plaintiffs were entitled to, submitted the question of defendant's negligence in signing the note, if he did sign it, to the jury, and it was not necessary to repeat the instructions so given. The jury having been properly instructed as to the effect his negligence in signing the papers would have, if they found that one of the papers so signed turned out to be this note, it was not necessary to incorporate that part of the charge into every other portion, unless it was apparent that otherwise the jury might have been misled by the omission. The charge was given and understood by the jury as a whole, although contained in separate paragraphs or requests and originating with different counsel, and we must examine it in the same connected way in which it was given to the jury, and upon the assumption that they did not overlook, but gave due and equal weight to each and every part.

But this second request of defendant's, as given, I think, standing alone, would not be open to objection. If the defendant never agreed to sign or give a note, and did not suppose or believe he was signing one, but was in fact only to sign, and believed he only was signing, the paper he had heard read, appointing him agent to sell the cultivator, it is somewhat difficult to see how he could be held liable upon this note; and it is equally difficult to see how a man signing

ANDERSON v. WALTER.

under such circumstances and under such a belief could at the same time be considered negligent. If he had not agreed to sign a note, but to sign, and believed he was signing, other papers, which he had heard read, and which in no way resembled in size or appearance a note, and which by no possibility could be tortured into a negotiable note, or by any ordinary change converted into one, he could not be considered guilty of negligence in so signing, even if it afterwards turned out in some mysterious manner that one of the papers he supposed he was signing was a note. Under such circumstances he had no intention of signing a note, but an instrument of an entirely different shape and tenor; that it should turn out to be a note would be certainly through no fault or want of caution on his part.

Nor, in my opinion, does the fact that the instrument appointing him agent contained the recital that it was "for and in consideration of the profits of ten machines, being the sum of two hundred dollars, to me in hand paid by note bearing even date, the receipt whereof," etc., make any difference. The words "by note bearing even date" were interlined, and it was a disputed question on the trial whether those words were not interlined after the paper had been read over to defendant, and without his knowledge. But however this may have been, the fact still remained that defendant at no time intended to or supposed he was signing a note, or that the obligation to pay two hundred dollars, as contained in the instrument he supposed he was signing, could become in any way a negotiable instrument. I concede there may be cases where a party signing and putting in circulation an instrument should be bound by the terms thereof, even though it turned out different from what he supposed it to be; but such cases cannot be carried so far as to hold that a party signing in good faith what he has heard read, and what purports to be a power of attorney, contract, deed, mortgage, or any similar instrument, shall afterwards be held liable in case a negotiable note of that date, which he did not know or suppose he was signing,

ANDERSON v. WALTER.

turns up. No man has a right to suppose that a crime is about to be committed, or that he is going to be defrauded by having a paper of an entirely different tenor substituted in the place of one he has just heard read and is about to sign, nor that a negotiable promissory note will be lurking in the depths of an instrument like those referred to. And he is not therefore required to take any steps to guard against such a contingency.

It may, however, be a question of considerable doubt whether there was any evidence in the case tending to show negligence on the part of the defendant, and any question of negligence, therefore, to submit to the jury. There certainly is no such tendency in the testimony of Simons. He testified that the duplicate agreement was read, compared and signed; that a book of blank notes was produced, a note filled up therein, read over by defendant with Kimball's assistance and then signed; that three papers were signed, the agreement in duplicate and the note. His evidence was direct and positive, that defendant knowingly and willingly signed the note in suit, and it excluded all question of negligence in any degree. When we turn to defendant's testimony, we find he is equally clear that he signed only two papers, viz.: the agency agreement in duplicate; that nothing was said about a note; he saw no note; that the note in suit was not presented to him and he never signed it, and there was nothing in his testimony on the stand, so far as appears from the record, tending to show that the signature to the note was genuine, whether obtained through carelessness or otherwise. The question presented from the testimony of these two witnesses upon the trial was one simply of a genuine note knowingly and willingly given, or a forgery. It is true the bill of exceptions does not contain all the evidence, but the burden is upon plaintiffs in error to show error affirmatively, and when they complain that the question of negligence was not properly submitted to the jury, they must show that there was evidence introduced on the trial to warrant such a charge.

ANDERSON v. WALTER.

The case in this respect was different from *Gibbs v. Linabury*, 22 Mich., 479. There the defendant testified that he actually signed three papers, two only of which were read or compared, but with the assurance that the third was just like them; that nothing was said about a note, nor did he sign, nor was he requested to sign such a paper; that if the signature to the paper read in evidence as a note was his, it was obtained as before stated. In this case defendant does not testify, nor was there any such evidence given, that he signed any paper upon any representation or assurance that it was like those he had heard read. He signed only two papers which he had heard read, and neither of them was this note, and that he did not sign the note in question. I am of opinion that this case comes clearly within the principle of *Gibbs v. Linabury*.

We discover no error in the giving of defendant's third request. There was evidence tending to show that defendant could read but very little; that the paper constituting him agent was read over to him by Kimball, and that it was not read correctly, part having been omitted. It would seem to be a self-evident proposition that where a party to an instrument undertakes to read it over in the presence and hearing of the other party thereto, in order that he may understand its contents before signing it, the party reading is both legally and morally bound to read it correctly, and that the other interested party has a right to rely upon its being so read and need not examine it himself. These papers were compared in the usual and customary manner, and ordinarily no negligence can be attributed to one who signs papers, after having so heard them compared, without any farther or other examination.

There being no error in the record, the judgment must be affirmed, with costs.

The other Justices concurred.

BRISTOL v. JOHNSON.

William P. Bristol and others v. Joseph Johnson and another.

Equity pleading and practice: Parties: Tax-payers: Injunction. Separate tax-payers may join as complainants in a bill to enjoin the collection of an invalid tax upon lands.

Taxation: Legislative power: Constitutional law. A statute providing for raising money by tax to reimburse a township treasurer for a sum paid by him to the township to make good an amount of the public money of which he had been robbed, is held unconstitutional and void.

Heard April 7. Decided June 6.

Appeal in Chancery from Barry Circuit.

This bill was filed to restrain the collection of a tax in the sum of six hundred dollars, assessed as a township tax for the year 1873, in the township of Johnstown, for the use and benefit of one Henry Bera, a former treasurer of said township, to reimburse him for moneys he had paid over to the township to make good an amount of township moneys which he had lost by robbery while he was such treasurer. The tax was levied by virtue of an act of the legislature, being *Act No. 387 of the Session Laws of 1873*. On the hearing below, the bill was dismissed, and complainants appealed.

James A. Sweezey, for complainants.

Charles G. Holbrook, for defendant Bera.

GRAVES, J:

Upon full consideration the court fail to see any distinction in principle between this case and others decided formerly. After the reception by Mr. Bera, as township treasurer, of money for the public, it may be assumed to have been taken from him by robbery, as he claims, and there would seem to be no doubt about its having been so taken

BRISTOL V. JOHNSON.

from him. After the loss, he obtained an equal amount by pledging his private estate and applied it to make good the deficiency. The public was thus made whole, and he was not in debt to it, and neither was the public, by this spontaneous restoration of the amount taken, caused to be in debt to him. There was unquestionably room for a strong moral appeal to the tax-payers of the township to divide the loss among the whole, instead of leaving it to fall wholly upon him; and the legislature saw fit to enact that the amount should be raised from the tax-payers and refunded to him, and in obedience thereto the sum was spread upon the roll and it became a lien upon the taxable real estate in the township, unless the enactment was invalid. The defendant Johnson, as treasurer, proceeded to make collection, and some of the tax-payers made payment without bringing into question the legality of the tax; but the complainants resisted and filed this bill, and after answer and proofs, the court below dismissed the complaint.

Whatever may be said in favor of the moral fitness of the purpose to relieve Mr. Bera, there can be no doubt of complainants' right to question their legal obligation or liability in the premises, nor of their right to escape payment if not liable; and that as matter of law they were not liable appears to the court to have been settled beyond controversy. A repetition of the reasoning of former cases is not necessary, and if further reasons might be added, they are not called for.

The objection based on the joinder of complainants who are separate tax-payers is answered by *Scofield v. Lansing*, 17 Mich., 437; and the more important question concerning the constitutional validity of the act of the legislature is distinctly determined in accordance with the position taken by complainants in *The People v. The Supervisor of Onondaga*, 16 Mich., 254. The decision there made and this enactment cannot stand together, and in the opinion of the court that case was correctly decided.

It follows that the act for raising the tax is not war-

BRISTOL v. JOHNSON.

ranted by the constitution, and that the decree below should be reversed and relief given to the complainants, with their costs in both courts; and the relief will be perpetual injunction.

The other Justices concurred.

The City of Detroit v. Elenore M. Beckman.

Concessions on the trial: Admission of rule of law. A concession on the trial that the defendant, a city, is liable for the injury complained of, is but the admission of a rule of law, and the court is not bound to accept and act upon it if satisfied there was in fact no right of action.

City improvements: Defects in the plan: Legislative action. Where complaint is made that the original plan of a city improvement is so defective as to render the work dangerous when completed, the fault found is with legislative action, and a suit grounded upon it is grounded on a wrong attributable to the legislative body itself.

Public improvements: Appropriation of private property: Plan of the work. The distinction in principle is pointed out between the case where the complaint is that the work must necessarily cause an injury to private property equivalent to an appropriation of some enjoyment thereof to which the owner is entitled, and a case where the fault found is with the plan, as not being the most wise and prudent to protect against accidents.

Highways: Guarding against dangers: Discretion: Local legislative action: Political question. The extent to which the public authorities shall guard the citizen against dangers when he is making use of a highway or other public convenience is and must be a matter of discretion. The wisdom and propriety of local legislative action cannot be made a judicial question; it is and must be a political question, and can arise only between the legislator and his local constituency.

Submitted on briefs April 14. Decided June 6.

Error to Superior Court of Detroit.

D. C. Holbrook, for plaintiff in error.

Otto Kirchner, for defendant in error.

COOLEY, CH. J:

This action was brought by the defendant in error to

DETROIT v. BECKMAN.

recover for the negligent killing of her intestate. The death appears to have been caused by the intestate running the wagon which he was driving through one of the city streets off the end of a culvert and overturning into a ditch. The accident took place late in the evening, and the complaint is, that the city was negligent in causing so short a culvert to be constructed, and leaving so much of the ditch open and unprotected. The ditch and culvert were not of recent construction, and it was not alleged that there was any negligence whatever in the construction except that which pertained to the plan itself.

In the brief for the defendant in error it is stated that "no question is made as to the liability of the city of Detroit for the injury set out in the declaration. The only questions arise upon the charges and refusals to charge as to what constitute negligence, etc." We do not find this distinctly admitted on the part of the city, and if it were, the admission of a rule of law could not obligate the court to accept and act upon it. And in this case it is very plain that there is no right of action whatever.

When complaint is made that the original plan of a public work is so defective as to render the work dangerous when completed, it is apparent that the fault found is with legislative action, and a suit grounded upon it is grounded on a wrong attributable to the legislative body itself. For the determination to construct a public work, and the prescribing of the plan, are and must be matters of legislation, whether done on behalf of the state by or under the direction of its legislative body, or on behalf of a county, town or city by or under the direction of the proper board or council. In the carrying out of the plan there may be negligence attributable to ministerial officers, but negligence in the plan itself must be attributed to the body that devised, ordered or adopted it.

There are cases in which a municipality has been held liable for the construction of a public work which necessarily and inevitably caused injury to individuals. The case

DETROIT v. BECKMAN.

of *Perry v. Worcester*, 6 Gray, 544, may be placed in this category. There in repairing a bridge over a river the space for the passage of the water was so narrowed that in times of freshet the water was set back upon proprietors above, to the serious injury of their property. *Child v. Boston*, 4 Allen, 41, was a case where a city was held liable for flooding the plaintiff's premises by neglecting to keep a sewer open and unobstructed, and it can have no bearing on the present controversy. *Lacour v. New York*, 3 Duer, 406, was an action on the case for an injury occasioned by an excavation in one of the streets of New York. On a careless reading it might seem to afford some countenance to the present action, but it is manifest from the opinion that negligence in the performance of the work was the basis of the recovery. There are many cases similar to these, in some of which the judgment has been based upon the negligent action of ministerial agents, while others have given a remedy for what was, in effect, a direct invasion of private property.

The distinction in principle between the case where the complaint is, that the work must necessarily cause an injury to private property equivalent to an appropriation of some enjoyment thereof to which the owner is entitled, and a case where the fault found is with the plan, as not being most wise and prudent to protect against accidents, seems very distinct and palpable. The public authorities cannot appropriate a man's property without making him compensation, whether it be done by excluding him from his land or by flooding or otherwise injuring it; but to what extent they shall guard the citizen against dangers when he is making use of a highway or other public convenience, is and must be a matter of discretion. The wisdom and propriety of local legislative action cannot be made a judicial question; it is and must be a political question, and can arise only between the legislator and his local constituency.

The leading English case upon this subject of *Governor, etc., v. Meredith*, 4 T. R., 796, has been often recognized

DETROIT V. BECKMAN.

in this country, and the principle applied in a variety of cases. It was applied in *Wilson v. New York*, 1 Denio, 595, where the complaint against the city was of neglect to construct proper drains and sewers to carry off surface water. This case was followed in *Mills v. Brooklyn*, 32 N. Y., 489, in a careful opinion by Denio, J., who refers to several decisions in New York which give it support. A like decision was made in *Carr v. Northern Liberties*, 35 Penn. St., 324-329, where the following remarks are made by Lowrie, Ch. J.: "Municipal corporations have often been held liable for carelessness in the exercise of their functions; but if we undertake to correct the evil in such a case as this, on the ground of carelessness, we do not see how to escape from the necessity of submitting the propriety of all acts of grading and draining in our towns to the decision of juries; for even discretionary acts may be charged to have been ignorantly or carelessly resolved upon. Any street may be complained of as being too steep or too level; gutters as being too deep or too shallow; or as being pitched in a wrong direction; and there may be evidence that these things were carelessly resolved upon, and then a tribunal that is foreign to the municipal system will be allowed to intervene and control the town officers. And the end is not yet; for if a regulation be altered to suit the views of one jury, the alteration may give rise to another case, in which the new regulation will be likewise condemned. This theory is so vicious that it cannot possibly be admitted." In support of the same views reference may also be made to *Child v. Boston*, *supra*; *Roberts v. Chicago*, 26 Ill., 249; *Snyder v. Rockport*, 6 Ind., 237; *Lambar v. St. Louis*, 15 Mo., 610; *Cotes v. Davenport*, 9 Iowa, 227; *White v. Yazoo*, 27 Miss., 357; and many others, all of which follow the early case of *Callender v. Marsh*, 1 Pick., 418, in which it was decided that no recovery could be had for incidental injury to property occasioned by the grading of a street; no question of negligence in the performance of the work being involved.

DETROIT V. BECKMAN.

In this state the question which lies at the foundation of this suit is not an open one. In *Larkin v. Saginaw County*, 11 Mich., 88, it was decided that no action would lie for an injury resulting from an exercise of legislative authority. In *Pontiac v. Carter*, 32 Mich., 164, which was a case of injury by change in the grade of a street to buildings previously erected with reference to an established grade, the point was quite fully discussed, and the liability of the city denied. These cases are decisive of the present.—And see *Dermont v. Detroit*, 4 Mich., 435-443.

Several of the rulings in the court below conflict with these views, but as it is necessary to pass only upon the main question, we do not consider it important to refer to the rulings specially. The judgment must be reversed, with costs of both courts. As no recovery can be had under the declaration, a new trial is not ordered.

The other Justices concurred.

Ephraim K. Roberts and another v. Albert H. Wilkinson and another.

Practice: Assignments of error: Abandonment. Assignments of error not discussed by counsel for plaintiff in error in the brief submitted are considered as abandoned.

Contracts: Promissory notes: Agreement to turn note upon a contract: Time: Extension. It is competent for the parties to a building contract in writing, which provides for payment only in cash, to afterwards agree orally that the amount of a note made by the builder and held by the other party should be paid thereon by delivering up and cancelling the note, and thereafter, as soon as work enough is done under the contract to pay such note, the note in the hands of such holder would thereby be satisfied; and if the note was not due when the work was completed, the new agreement would operate to extend the time of payment on the building contract until the note matured, and the builder could not in the meantime maintain an action for the money due upon the contract; nor could he, by suspending work on his contract, defeat this new agreement to the extent of the money earned.

34 MICH.—17.

ROBERTS v. WILKINSON.

Quantum meruit: Express contract: Payment in money. One who by his contract is to receive payment in something else than money, cannot, where he has broken his contract, sue upon the *quantum meruit* and recover the value of the labor performed under the contract and thereby convert into cash payments what, according to his agreement, is payable in something else; the express contract is not to be disregarded in such case.

Agreement to offset counter demands: Payment. An agreement thus to apply money earned to the extinguishment of an obligation to the employer is one which executes itself and does not require the formality of passing the money back and forth; but these compensations, when they fairly and properly occur, are reciprocal payments.

Promissory notes: Endorsers: Representations by holder: Payment. Where the holders of an endorsed note which they have thus agreed to turn on their contract with the maker, have informed the endorser that work enough had been done on such contract to satisfy the note, they are bound by this statement, and in their suit upon the note against such endorser, they will not be permitted to show that the endorser lost nothing by reason of his relying upon such statement.

Promissory notes: Endorsers: Security: Representations. Nor would the fact that such endorser may have had security from the maker for his endorsement make any difference in his right to hold plaintiffs to their representations in this regard.

Evidence: Immaterial matters. Bankruptcy proceedings instituted against the maker of the note after he had abandoned his contract with plaintiffs, he not being a party to the suit on the note, were not admissible in evidence and could not affect the rights of the endorser if the note had already been paid.

Submitted on briefs April 14. Decided June 6.

Error to Superior Court of Detroit.

J. G. Dickinson and J. P. Whittemore, for plaintiffs in error, to the point that the declaration claimed to have been made by Roberts to Wilkinson, as to work enough having been done on the building contract to satisfy the note, was neither a payment nor release for a consideration, nor did it create an estoppel *in pais* (for in the latter aspect the question of injury from reliance upon it was expressly taken from the jury), cited: *Driskell v. Maher*, 31 Mo., 325; *Baker v. Briggs*, 8 Pick., 122; *Harris v. Brooks*, 22 Pick., 195; *Dewey v. Field*, 4 Met., 381; *Green. on Ev.*, §§ 207, 212; *Carpenter v. King*, 9 Met., 511, 517; *Bank v. Klengensmith*, 7 Watts, 523; *Ruggles v. Patten*, 8 Mass., 480; *Smith v. Bartholomew*, 1 Met., 276; *Thomas v. Cleveland*, 33 Mo., 126; *Hadlee v. Jones*, 43 Mo., 235; and to the point that the agree-

ROBERTS v. WILKINSON.

ment for the future application of the money to become due on the building contract, in payment of the note in suit, was neither a present payment nor suspension of action upon the note, cited: *Moore v. Det. L. Works*, 14 Mich., 266; *Moore v. Paine*, 12 Wend., 123; *Carpenter v. Kelley*, 9 Ohio, 106; *Agnew v. Bell*, 4 Watts, 31; *Hays v. Ward*, 4 J. C., 123; *Story Eq. Jur.*, § 481; *Lechmen v. Hawkins*, 1 Esp., 626; *Loudon v. Tiffany*, 5 W. & S., 367; *Cary v. Bancroft*, 14 Pick., 317; *Dehon v. Stetson*, 9 Met., 341; *Eaves v. Henderson*, 17 Wend., 190; *Flint v. Clark*, 12 J. R., 374; *Foster v. Trill*, *Id.*, 456; *Gardner v. Callender*, 12 Pick., 374; *Davis v. Spencer*, 24 N. Y., 390. An accord executory cannot be made available as payment of a promissory note, when not executed before action brought.

Baker & Thompson and *Alfred Russell*, for defendants in error, cited: *Eaves v. Henderson*, 17 Wend., 190; *Davis v. Spencer*, 24 N. Y., 390; *Ripley v. Ætna Ins. Co.*, 30 N. Y., 136, 164.

MARSTON, J :

Plaintiffs in error brought an action of assumpsit to recover the amount due upon a promissory note dated February 13, 1875, signed by James T. Hurst and endorsed by defendants. The execution of the note, the endorsements, and all that was necessary to make a *prima facie* case, was admitted on the trial. Evidence was then given tending to show that there was then due thereon the sum of two thousand one hundred and seventy-five dollars and five cents, when the plaintiffs rested.

Defendants then introduced testimony tending to show that Hurst borrowed four thousand dollars from the plaintiffs on five or six months' time, giving two promissory notes therefor, endorsed by defendants and Mr. Barbour; that

ROBERTS v. WILKINSON.

after borrowing this money Hurst, October 12, 1874, entered into a written agreement with the plaintiffs to build them a house according to certain plans and specifications, the work to be completed on or before the first day of April, 1875. In case of any delay he agreed to pay them five dollars per day as damages, which plaintiffs might retain out of any money due and unpaid on the contract. Under this contract Hurst was to receive for his share of the work four thousand five hundred dollars: when the building was enclosed and the floors laid, fifteen hundred dollars, and three thousand dollars when the job was completed.

Defendants also gave evidence tending to prove that at the time this contract was entered into, it was orally agreed between Hurst and plaintiffs that the payments which would become due to him thereon should be paid part in cash and the remainder upon these notes; that the notes became due in February, 1875, when the building had been partly completed; that two thousand dollars of the amount then due Hurst was paid upon one of the notes which was delivered up, and the other renewed by giving the note in suit; that thirty days was the time first spoken of for which this new note should be given, but sixty days was agreed upon, as the house would be completed within that time; and that it was then agreed between Hurst and plaintiffs, that Hurst should not draw any thing on the contract until this note was paid, which was to be paid out of the moneys coming to him upon the contract. It also appeared that there was extra work done upon the house by Hurst at plaintiffs' request, amounting to six hundred and forty dollars.

It farther appeared that Hurst suspended work May 26th; that the house was not completed until July 10th; that it cost four hundred and thirty-four dollars and eighty-eight cents to complete it; that the total delay in the completion of the work was one hundred and one days at five dollars per day; that the fair rental value of the premises when completed was about one thousand dollars per annum. There

ROBERTS v. WILKINSON.

was considerable other evidence, but the above is sufficient to an understanding of the questions raised, except as more fully set forth hereafter.

This case was not argued. In the brief submitted by counsel for plaintiffs in error the first nine pages purport to be a "statement of the case." The remainder is devoted to a discussion of certain of the assignments of error. We shall therefore assume that the assignments not discussed in the brief have been abandoned, and shall limit our examination accordingly.

The first question discussed, which is also the most important, relates to the charge of the court, and is covered by the eighth assignment of error. To understand the facts upon which this portion of the charge was founded, it will be necessary to state more fully the agreement entered into at the time this note was given, as to the way in which it was to be paid by Hurst. There was really no dispute between the parties but that at the time the note of February 13th, the one in suit, was given, an agreement was entered into between Hurst and plaintiffs, that the money which would otherwise be going to Hurst for work on the house was to be "turned" on this note as payment, and that no more money should be drawn by Hurst, upon his contract, until this note should mature and was paid, it being then contemplated that the house would be completed before this note would mature. Of this Wilkinson had notice.

Mr. Wilkinson testified: "I subsequently (to the giving of this note) saw Mr. Roberts (one of the plaintiffs) at his bank in regard to the matter, and asked him how Hurst was getting along with the building. Well, he said, Hurst was getting pretty well along with it, and he said at that time there was enough work done, so that if Hurst should quit there would be sufficient to pay the note at any rate. * * I afterwards saw Roberts in front of the Russell House. I was driving along in a buggy one afternoon, I think it was; I asked him about how Hurst was getting along with the

ROBERTS V. WILKINSON.

building, and he said it was pretty well along, that I need not bother myself about the matter any more; it was all right."

The charge complained of upon this evidence was as follows: Counsel for defendants, after referring to this testimony, said: "I ask the court to instruct the jury that if they believe the testimony of Mr. Wilkinson in that respect, if they find Mr. Roberts did so state to him, that Mr. Wilkinson would be discharged from his liability on this endorsement, no matter how it came out as between Mr. Hurst and the plaintiffs." To which the court replied: "I think that probably is the law, and that request should be given in this way: I understand there is no real dispute between the parties as to a conversation being had, and an understanding being had, as to the application of this money at the time the contract was entered into, or about that time. One of the notes was given up, and it is alleged on one side that it was given up in pursuance of this agreement. Now, if at a subsequent period the plaintiff in this case informed Mr. Wilkinson that that was the agreement and understanding between them, and that payment had been made, so that he need pay no further attention to this note, then I think they are bound by that, if you shall believe that statement."

It cannot be doubted, even had the written contract of October 12, 1874, provided that the payments for work done upon the house should have been made in cash, and to the exclusion of their being applied upon any other claim or in any other way, but that the parties thereto could afterwards have varied or changed that agreement in that respect. They could have agreed orally that two thousand dollars, or whatever amount might be necessary, should by plaintiffs be retained in payment of this note; and should such an agreement have been made, immediately, upon work to that amount having been done, as agreed upon, the note would thereby, in the hands of the plaintiffs, have become satisfied; and it could not afterwards, by any act of plaintiffs

ROBERTS v. WILKINSON.

and Hurst, or of either of them, have been changed to the injury of the endorsers. Such an agreement, when carried out by doing the work, would, without any further act, operate as a payment of the note. If the note was not due at the time the work was done, the money would remain in plaintiffs' hands to meet it. And under such an agreement Hurst could not maintain an action against the plaintiffs for the amount earned upon the contract. By the new agreement the time of payment had been extended, and the payment appropriated for a new and special purpose, inconsistent with the right of Hurst to sue and recover. Nor could Hurst, by suspending work upon his contract, defeat this agreement to the extent of the money earned. If he could, then a party entering into a contract to do certain work, for a consideration to be paid at a certain time, after the completion thereof, or to a certain party, or to be applied upon a certain note or account upon completion of his job, could abandon the contract just before completion, when the principal part of the consideration had been earned, sue at once upon the *quantum meruit*, and if permitted to recover, thus, by his own wrongful act, defeat the intention and terms of the agreement which he had previously solemnly entered into. If such is the law, it is an inducement for parties to violate their agreements wherever they would be the gainers thereby. It is a mistake to suppose that upon a *quantum meruit*, where the plaintiff has broken his contract, the express contract is lost sight of, except as it may limit the amount to be recovered. The party who has violated his agreement can, where he has in good faith endeavored to perform, sue upon a *quantum meruit*, and recover for the work actually done, if consistent with his agreement except as to complete performance. In other words, where a party has violated his agreement, he cannot then, upon a *quantum meruit*, recover a judgment for the value of the work and labor done, and thus convert into cash payments what, according to his special agreement, were upon time, or

ROBERTS v. WILKINSON.

payable in something else than money.—*Wilson v. Wagar*, 26 Mich., 452.

There being then such an agreement, which could not thus be defeated to the injury of the endorsers, upon the amount being earned it executed itself by paying the note, without any farther act of the parties. Upon the amount being earned, it was not necessary that the formality should be gone through of plaintiffs handing the amount over to Hurst and he handing it back again. "Each one, under such circumstances, retains in payment of what is due to him, that which he owes to the other, whether it be for the whole debt, if the sums are equal, or by deducting a lesser debt out of a greater. These compensations, when they fairly and properly occur, are reciprocal payments."—*Connecticut Mutual Life Ins. Co. v. The State Treasurer*, 31 Mich., 14.

In view, therefore, of the legal effect of the agreement, we see no error in the charge as given upon this question. The endorser knew that the note was to be paid by work done upon plaintiffs' house. He was interested in seeing that the work was done, in order that he might be released thereby. When, therefore, he inquires how the work is progressing, and is informed by the holder of the note, then past due, that the work has so far progressed as to pay the note, and that he (the endorser) need not trouble himself about the matter any more, we think the holder should be bound thereby. The effect of such information is to throw the endorser off his guard and prevent him from taking the steps he otherwise would be supposed to take for the payment of the note or his own security, and the inquiry cannot afterwards be made whether the endorser was in fact injured by the information given or not, any more than it could be in a case of a failure to protest or give him notice of the non-payment.

Suppose at the time this note became due it had been protested for non-payment, and notice thereof given the endorser, but accompanying the notice the holder had sent

ROBERTS v. WILKINSON.

a written statement that the note had been paid and that the endorser need not further trouble himself about the matter. Can it be doubted but that such a statement would have counteracted the effect which the notice of protest otherwise would have had and was intended to have, viz.: apprise the endorser of the non-payment so that he might take steps to protect himself? I think no one can doubt but that it would, and that the holder should be bound by his statement. Now, in principle, or in the effect it would have, what difference does it make if such information was given orally by the holder, or that it did not accompany, but was given after the notice of protest? The endorser was interested in urging Hurst to complete the building in order that the note might be paid; the information given him was sufficient to allay and quiet his efforts in this behalf, and therefore may have prevented, through his efforts, the completion of the building by Hurst and payment of the note. If it did, the injury would be direct and palpable. Whether it did or not prevent the completion of the building, would be a very difficult question for a jury to ascertain and determine.

The fact that the endorser may have been secured, can make no difference. The securities may not have been sufficient, or he may upon receiving such notice have surrendered them up, or failed to look for additional security. Various reasons might be assigned. The fact that he was secured would not prevent his being directly interested in seeing that Hurst paid it, and the information given prevented him from so doing.

As to whether there was an agreement that the note should be paid out of the proceeds of the building was by the court submitted to the jury more favorably to plaintiffs in error than the above remarks would have warranted.

It is next objected that the court erred in excluding the offer in evidence of the bankruptcy proceedings against Hurst. The proceedings were not instituted until after Hurst had quit work upon the building, and under the above view these

 ROBERTS v. WILKINSON.

proceedings were wholly immaterial. They could not affect the rights of the endorsers if the note had been paid.

It is next urged that the court erred in its instructions as to the effect of the agreement for extra work upon the extension of time.

It may be at least questionable whether the tenth assignment, which raises this question, is not too general. This portion of the charge was too lengthy to repeat here, but we think the court presented this branch of the case very fairly to the jury, and we do not discover any error in that portion of the charge, or in the record.

The judgment must be affirmed, with costs.

The other Justices concurred.

William D. Fitzhugh v. Andrew C. Maxwell.

Equity jurisprudence: Forfeitures: Land contracts. A court of equity has no jurisdiction to enforce forfeitures; if the vendor in a land contract desires such relief he must seek it at law, or by entry for the breach of condition.

Land contracts: Equitable title: Lien for purchase price: Foreclosure: Sale. A contract for the sale of land conveys to the vendee an equitable title, and the only principle upon which the vendor may sue for his money, and at the same time seek security against the land, is the one which recognizes the analogy to a vendor's lien in cases where the legal title has been conveyed; and the vendee's title can only be divested by a sale. There can be no such thing as a strict foreclosure of such a lien.

Land contracts: Vendor's claim: Money debt: Lien on the land. The claim of a vendor in a land contract is but an ordinary money debt secured by the contract, and his proceedings to enforce the lien upon the land should be governed by the analogies of proceedings to enforce other equitable liens, and be executed by a sale to satisfy the amount due.

Heard April 14. Decided June 6.

Appeal in Chancery from Bay Circuit.

McDonell & Mann, for complainant.

A. C. Maxwell, in person, for defendant.

FITZHUGH v. MAXWELL.

CAMPBELL, J :

In March, 1868, Fitzhugh sold by executory contract to Maxwell twenty-nine acres of land in Bay county for two thousand one hundred and ninety-two dollars and twenty-five cents, payable in four equal annual installments, with seven per cent. interest. One-fourth of this was paid down. Whether any further payments were made is disputed. Maxwell was entitled to and received possession.

On the 7th of May, 1875, Fitzhugh filed a bill insisting on a forfeiture of the contract, but with a prayer for general relief. A decree was granted of forfeiture unless the amount set forth in the decree was paid by May 7, 1876. That amount gave no credits beyond the first payment.

A court of equity has no jurisdiction to enforce forfeitures. If a party desires such relief he must seek it at law, or by entry for the breach of condition. In the present case the contract contains no clause of forfeiture whatever, and as time is not of the essence of such a contract, and has not been made so by any subsequent action of either party, the utmost that could be claimed would be a rescission, if the circumstances justified it. But in this case the delay has been allowed without any peremptory notice or demand to change the ordinary condition of affairs.

Assuming that a bill framed with such a prayer as the present one can be allowed to stand as a bill for specific performance, the decree is erroneous in not requiring the payment of money absolutely and a sale to enforce the vendor's lien. The only thing due to the vendor is his money, and this is due as an ordinary money debt, which it is the object of the suit to collect. It is so purely a debt that a writ of *ne exeat* lay to secure it, which is never granted in any case except as equitable bail for a sum due and ascertainable as a money demand. The nature of the suit and the character of the rights of both parties is very well set forth in *Boehm v. Wood*, 1 T. & R., 332, where the writ was maintained and explained by Lord Eldon.

FITZHUGH v. MAXWELL.

While at law the title remains in the vendor, yet in equity the contract conveys it to the vendee, and the only principle which allows the vendor to sue for his money, and at the same time seek security against the land, is the one which recognizes the analogy to a vendor's lien in cases where the legal title has been conveyed. The title of the vendee, whether legal or equitable, can only be divested by a sale, and under the English practice, until judicial sales were more recently provided for by other means, the defendant's conveyance was necessary to bar his rights.—*Boehm v. Wood*, *supra*. There is no recognition anywhere of the doctrine that there can be a strict foreclosure of such a lien, whether the land has been conveyed or not. And the only controversy has been, whether cases did not exist where, by reason of the defendant's bankruptcy, or by reason of the peculiar nature of the property and its uses, the lien was lost entirely. There have been several cases where it became necessary to consider whether a sale for railway purposes left such a lien in existence. It was, however, maintained; but the court has uniformly refused to regard the vendor as entitled to the rights of a mortgagee, or to give him possession, as is done in mortgage cases, before sale.—*Pell v. Northampton & Banbury Junction R. W. Co.*, *L. Rep.*, 2 *Ch. Ap.*, 100; *Walker v. Ware, Hadham & Buntingford R. W. Co.*, *L. R.*, 1 *Eq.*, 195, recognized and approved in *Wing v. Tottenham & Hampstead Junction R. W. Co.*, *L. R.*, 3 *Ch. App.*, 740; also see *Munns v. Isle of Wight R. W. Co.*, *L. R.*, 5 *Ch. Ap.*, 414, where, although the railroad was insolvent, the appellate court reversed an order which granted an injunction against their use of the road, and placed the road in the hands of a receiver so that neither party should be damnified. In *Topham v. Constantine, Taml.*, 135, the vendor's lien was confined to the deficiency after taking account of personal assets where the vendee had died. In *Rome v. Young*, 3 *Y. & Coll.*, 199; 4 *Y. & Coll.*, 204, where the purchaser had died insolvent, the vendor was only allowed to come in and make proof in a

FITZHUGH V. MAXWELL.

creditor's suit for the deficiency after the estate was sold and proceeds applied on the lien. A similar rule applied in bankruptcy in *Exp. Gyde*, 1 G. & J., 323.

An equitable lien has never been enforced except by sale. This is recognized in the decisions referred to, and in *Seton on Decrees*, 177. A strict foreclosure is deemed inapplicable, even under the English rule, which grants that relief on mortgages, and although the contract may contain terms of forfeiture. The only alternative seems to be, in some cases, to allow a dismissal of the bill and a rescission where the purchaser makes default in paying the sum decreed. A suit on a mortgage in England is not a suit to collect money, but one to get land, whereas a bill by a vendor is always to get his money, and the lien on the land is only a means of collecting it in whole or in part.

The American theory of mortgages, as securities and not estates, makes what we term foreclosure proceedings really collection proceedings, and with us a sale is the universal means of satisfaction. To apply the doctrine of strict foreclosure to a vendor's lien, and not to an express mortgage, is a direct reversal of all rules, and in violation of every equitable principle and analogy.

The decree is erroneous in this respect.

So far as the deduction is concerned which Maxwell claims, the testimony is somewhat conflicting. Maxwell's evidence, that the services and expenditures which he proves were to be allowed, shows his own understanding that Fitzhugh so agreed. But as the payment was never actually applied on the contract, and as when Maxwell furnished his accounts he claimed the credit generally, when there were other debts also, it can hardly be regarded as a payment in the strict sense of the term. We think the amount of the decree cannot therefore be reduced. But as a decree to enforce a forfeiture it was clearly wrong, and it was not framed on any other basis. It is just, however, to allow it to be rectified so as to provide for a sale in the usual manner of mortgage sales,—the complainant joining in the conveyance,—

FITZHUGH v. MAXWELL.

in case the money is not paid; the time for payment to be extended until the seventh of August, and the defendant to be allowed costs of the appeal, but not of the circuit.

The decree below must be reversed, and a new decree entered in accordance with these suggestions, and the case remanded for further proceedings.

The other Justices concurred.

George Raymond and another v. Jacob Shawboose and others.

Equity jurisprudence: Amount. An objection to a bill for specific performance, that it fails to aver the value of the lands to exceed one hundred dollars, is not sustained where it appears from it that complainants paid more than that sum.

Indian treaty of October 18, 1864: Competency: Selection. Under the practical interpretation put on the Indian treaty of October 18, 1864, by the government, the selection of lands and the competency of the grantees both became operative together when fixed by the proper official authority, and both were before that ambulatory.

Indian treaty: Sales of lands: Competency. No disposition by an Indian of lands he expected to receive under this treaty, which antedates the determination of his competency to take under the terms of the treaty, can be held valid.

Indian agents: Decisions: Fraud: Executive department. The executive department is not so bound by the conduct of Indian agents that it cannot repudiate their frauds and decline to follow their false decisions.

Specific performance: Cloud upon title: Decree: Remedy at law: Costs. Where, under a bill for specific performance, both parties have proceeded without objection upon a hypothesis that would make a subsequent deed given by the vendor to his co-defendants a cloud upon the title, the court, though holding such deed of no force, and that complainants' remedy at law was ample, affirmed the decree below requiring defendants to release to complainants, though without costs to either party.

Heard April 18 and 19. Decided June 6.

Appeal in Chancery from Isabella Circuit.

John J. Wheeler, for complainants, to the point that the grantor having an equitable or inchoate title when he

RAYMOND v. SHAWBOOSE.

conveyed, the patent afterwards obtained enured to his grantee in the prior conveyance, though there was no covenant in the deed, cited: *Doe v. Wilson*, 23 How., 457; *Mazwell v. Moore*, 22 How., 185; *Berthold v. McDonald*, Ib., 334; *Ward v. Bartholomew*, 6 Pick., 409; *French v. Spencer*, 21 How., 228; *Quinney v. Denny*, 18 Wis., 485; *Crews v. Burnham*, 1 Black, 352; *Corbin v. Jackson*, 14 Wend., 619; *Jackson v. Livingston*, 7 Wend., 136; *Jackson v. Alexander*, 3 Johns., 484; *Jackson v. Root*, 18 Johns., 90; 10 How., 348; 14 Gray, 495, 497; 2 Allen, 118; 29 Ia., 276; 13 Cal., 536; 5 Allen, 548; and the deed in question here contains covenants of warranty, therefore the title acquired afterwards enured to the grantee by estoppel: 3 Wash. R. P., 102 and cases cited; 21 How., 228; 18 Wis., 486; 1 Black, 352; 3 Johns., 484; 10 How., 374; 11 How., 325; 22 How., 190; the grant by the treaty, of the reserved sections, is a present grant of the interest of the United States in the lands within its terms, and the patent is only required to designate the particular selection made: 14 U. S. Stat. at Large, p. 3; *Johnson v. Ballou*, 28 Mich., 379; *Busch v. Donohue*, 31 Mich., 481; *Clark v. West*, 23 Mich., 242; the patent, having issued to this Indian, is conclusive proof of his ownership, and relates back to the ratification of the treaty, and his assignee is vested with the legal title: *Doe v. Wilson*, *supra*; *Shotwell v. Harrison*, 22 Mich., 410; *Clark v. Hall*, 19 Mich., 357.

John C. Leaton and *W. N. Brown*, for defendants, on the subject of jurisdiction as affected by the amount in controversy, cited: *Comp. L.* 1871, § 5059; *White v. Fuller*, Walk. Ch., 112; *Gamber v. Holden*, 5 Mich., 331; *Spears v. Gwinn*, 9 Paige, 362; that the treaty does not directly or impliedly authorize the delegation by the beneficiary of the right of selection to any body,

RAYMOND v. SHAWBOOSE.

see *Johnson v. McIntosh*, 8 Wheat., 543 and cases cited; *U. S. v. Cook*, 19 Wall., 591; *Ballou v. O'Brien*, 20 Mich., 304; if Shawboose at time of conveying to complainants had any rights to the lands described, it was a right in common with the other members of the tribe, he not having then made any selection: *Walker v. Henshaw*, 16 Wall., 436; *U. S. v. Cook*, *supra*; selection was not made within the meaning of the treaty till approved by the commissioner of Indian affairs, March 29, 1872; and all that was contracted for by complainants' deed of July 14, 1871, was a mere right of selection; and the beneficiary could not sell his selection, or right of selection, before he had become entitled to any parcel in severalty, as this would render the classification provided for by the treaty nugatory; the right of selection is a personal privilege and not salable: *Clark v. Baker*, 14 Cal., 612.

CAMPBELL, J:

Jacob Shawboose is an Indian belonging to the band of Chippewas of Saginaw, Swan Creek, and Black River, in the state of Michigan, and entitled as head of a family to eighty acres of land, concerning forty of which the present controversy arises. Under the treaty of October 18, 1864, it was provided that as soon as practicable after the ratification of the treaty the agent for the said Indians should make out a list of those entitled to selections under the provisions of the treaty, and divide the persons enumerated in said list into two classes, viz.: "competent" and those "not so competent." Those who were intelligent, and have sufficient education, and are qualified by business habits to prudently manage their affairs, shall be set down as "competent." Those who were uneducated, etc., and all orphans, and all persons of idle, wandering, or dissolute habits, were to be put in the other list. Patents were to be issued in

RAYMOND v. SHAWBOOSE.

fee simple to "competents." The patents to persons "not so competent" were to contain a clause against alienation without the consent of the secretary of the interior.

July 14, 1871, Shawboose, who appears to have selected the northeast quarter of the southeast quarter of section twenty-eight, in town fifteen north, of range three west, made a deed to complainants whereby he conveyed those premises, but limited the interest conveyed to the pine trees and timber, and the use of the land for lumbering the same. The deed contained this further provision: "It is expressly understood that the said first party sells and conveys all pine trees and timber of which said party is or may become possessed under and by virtue of said treaty; therefore, to carry out the meaning and intent and purposes of this conveyance, the said first party hereby gives unto the second parties full and complete permission to change the above description of land so that the same description shall be embraced in the government land patent which may be issued to said first party."

On the 21st of January, 1872, Irving E. Arnold, an agent of complainants', gave to the Indian agents at Detroit as Shawboose's selection the northwest quarter of the southeast quarter of section twenty-five, in township fifteen north, of range three west, and on the 20th of August a patent was issued for this parcel, reciting an order of the secretary of the interior dated April 1, 1872, accompanied by a schedule of selections certified, March 29, 1872, by the commissioner of Indian affairs, to have been made by the members of the band, and that in said schedule the tract in question "is designated as the selection of Jacob Shawboose, who is denominated a 'competent,' and in whose favor a patent is ordered to be issued."

On the 26th day of September, 1872, Shawboose made a new conveyance to complainants of the pine timber on this land, and the right to enter on the land and cut the timber and remove it at any time within two years.

The deed of July, 1871, was filed with the register of

RAYMOND v. SHAWBOOSE.

deeds of Isabella county, but was not recorded until after defendants obtained their alleged title.

On the 26th day of January, 1872, a deed was executed by Shawboose to defendants Hill and Gamble, which first purports to convey the land afterwards patented, and all the pine timber on any land he had received on any treaty, and all claims for trespasses on such lands, and then appoints William H. Hill his attorney in fact "to select any land to which he is entitled under above treaty, and to sell any he may thus select as follows: The pine timber suitable for saw logs for one dollar per thousand; the oak and ash for two dollars and fifty cents, cubic; and the land for one dollar and twenty-five cents per acre, to be paid within six months after the receipt of the patent for the land." This power of attorney was declared irrevocable for two years. The deed was recorded January 27, 1872, but the acknowledgment was erroneously dated in July, 1871.

The bill avers this deed to have been obtained by fraud, by deceiving Shawboose into supposing it was something else, and charges notice of complainants' rights. The bill prays specific performance of the agreement of July, 1871, in the deed of that date, and for general relief.

This bill was filed in September, 1873. Defendants put in a brief, unsigned answer, which neither admitted nor denied any thing, but which, instead of striking from the files, complainants replied to. A decree was made in complainants' favor, for a release from Hill and Gamble.

An objection was made that it does not appear that the amount in controversy exceeds one hundred dollars. It does appear that plaintiffs paid more than that sum, and it may be presumed it was not an over payment.

There is no claim in the answer that defendants were *bona fide* purchasers without notice, and the testimony does not lead to that inference if they had set up such a defense. But they seem to rely on the fact that their interest, having been conveyed after the selection, is to be preferred to complainants' interest, which was agreed for before; and upon

RAYMOND v. SHAWBOOSE.

the further fact that their deed describes the premises in question, while complainants' deed of July, 1871, does not.

Both parties, so far as their earlier conveyances are concerned, rely on them as operating by way of covenant or estoppel to reach the land thereafter patented. Defendants, however, claim that Shawboose's right became fixed when he made the selection, and that the conveyance to them, therefore, was good at law as a present grant.

We are entirely satisfied that Shawboose, who was a marksman and illiterate, was misled into signing this paper by being made to believe it was merely authority for selecting and disposing of other land than what he had authorized complainants to select and use; and that he distinctly informed defendants of his arrangement with complainants, and was told the paper would only cover such possible further selections as he might have the right to make. He thought and said he had exhausted his rights, as he had in fact.

There is no sort of question that Shawboose never meant to cheat complainants. The deed of January, 1872, was a manifest fraud on him. But the peculiar nature of the controversy renders it necessary to consider the real character of the rights of Shawboose himself.

The treaty of 1864 was a modification of one of 1855, whereby the same right of selection was given to each head of a family, to receive eighty acres of land.—*L. U. S., Vol. 11, p. 633*. By the earlier treaty, lists of Indians were to be made out by July 1, 1856, and not later. Certificates were to issue for the selections, which could not be assigned or transferred, and patents were not to issue until ten years thereafter. But the president was empowered, in such cases as might render the grantee unfit to dispose of his property, to provide against its conveyance by the patentee.

The treaty of 1864 required the selections and lists to be made "as soon as practicable," by the agent. It evidently assumed that the lands would be selected and patented to all persons capable of choosing for themselves without delay,

RAYMOND v. SHAWBOOSE.

and it probably did not contemplate any needless changes, or any changes at all in the lists. No evidence is before us of the regulations adopted by the land office for making and changing selections. It is apparent from some circumstances shown incidentally that all of the local transactions were not such as would have been approved at Washington. So far as we can judge no report was made of the competency of the parties except in connection with the selections. In the interval of six years between the treaty and the patent, many "orphans," who were positively disqualified by the treaty, must have reached full age; some may have lost the disqualification of ignorance, and some may have gained that of idleness and bad habits.

The result of the practical interpretation put on the treaty by the government is, that the selection of lands and the competency of the grantees both became operative together when fixed by the proper official authority, and both were before ambulatory.

Where a standard of competency is adopted, and the right of a patentee to dispose of his lands depends on his classification, we think the policy of the government is against maintaining any transaction made before that determination. A contract in such cases must be good or bad when made. In other words, the Indian is incapable until his competency is declared, and it does not relate backward. If any other rule is adopted it must be ruinous, because the Indians would be cheated out of their lands, and no one would pay a decent price for a voidable bargain. And the treaty evidently contemplates that one may become competent who was once incompetent, by reaching majority, or becoming educated, or reforming. It would be impossible in any case to know what certificate would have been given by an agent at any date before that on which he acts. In the present case it appears there was official action by a former deceased agent, whose papers were lost, but who may not have deemed Shawboose competent. While the patent is conclusive for what it asserts, yet the evidence is also morally conclusive that

RAYMOND V. SHAWBOOSE.

the designation of Shawboose as competent was itself a very gross violation of the treaty, which contemplated education as indispensable. Shawboose can neither read nor write, and was helpless in the hands of these parties. It is certainly to be hoped, and for the honor of human nature must be presumed, that no certificate of competency was or could have been given by any previous agent or at any previous time.

We feel bound to hold, until otherwise decided by the United States supreme court, that no disposition of lands under this treaty can be valid which antedates the determination of the grantee's competency.

The question then arises, at what time that was so fixed. The patent refers only to the determination by the commissioner of Indian affairs, on the 29th day of March, 1872, approved by the secretary of the interior on the 1st of April. We think this was the first official action which bound the government.

We cannot accept the doctrine that the executive department is so bound by the conduct of Indian agents that it cannot repudiate their frauds and decline to follow their false decisions. The treaty of 1855 expressly recognized the duty of the president to guard the Indians from being enabled to dispose of lands when not competent to manage their own interests. A treaty is a contract with the nation, and when the executive has to carry it out by granting patents which distinguish between competent and incompetent grantees, who are to be classified by his own subordinate officials, it is more consistent with our system to regard all of these agents as under executive supervision, than to recognize in them a power to compel their superiors to carry out what they may be satisfied is a fraudulent arrangement.

We shall, therefore, until otherwise decided by the supreme court, hold that the United States government was not bound until the action was had by the Indian department on the 29th of March, 1872, as set forth in the patent.

RAYMOND V. SHAWBOOSE.

It follows from this that complainants have no claim going back of their conveyance made subsequent to the patent, and that Hill and Gamble have no claim at all. Complainants' remedy against trespass would be ample at law.

As both parties, however, rested their claims and arguments on a hypothesis which would have made defendants' deed a cloud upon complainants' title, and no such objection was made to the jurisdiction, we do not think it worth while to disturb so much of the decree as requires defendants to release to complainants. Shawboose has not appealed, and has waived the two years' condition (*Green v. Bennett*, 23 Mich., 464), and the equities are against Hill and Gamble. But we think neither party should recover costs in this court. The decree will be modified accordingly.

The other Justices concurred.

Menzo Pope v. Julia R. Cutler.

Deeds: Registry: Certificate: Seal. A seal is essential to a certificate of authentication of due execution of a deed executed in another state to entitle the deed to be recorded under the statute of 1840.

Cases distinguished. This case and *Starkweather v. Martin*, 28 Mich., 471, are held to be distinguishable.

Probate courts: Wills probated abroad: Foreign probate: Jurisdiction. In order to entitle wills probated abroad to be admitted to probate here, the copy of the will presented must be accompanied by the foreign probate and due authentication thereof, and these together constitute the one instrument or subject matter to be acted upon under the statute, and all are essential to authorize the probate court to exercise the jurisdiction.

Heard April 19. Decided June 6.

Error to Lenawee Circuit.

A. L. Millard, for plaintiff in error.

Howell & Watts, for defendant in error.

POPE v. CUTLER.

GRAVES, J :

The defendant in error brought ejectment and recovered, and the plaintiff in error objects to rulings at the trial. To support her claim the defendant in error was allowed to give in evidence the record of a conveyance made in the fall of 1840 from Robert Van Rensselaer to Josiah R. Stuyvesant, the proceedings in an attachment suit against one Oliver Vanderbilt, and a judicial sale based thereon, and also the will of Frederick W. Walker containing a devise to her of the premises.

Several exceptions were taken to the attachment proceedings, but we are not satisfied that either of them can be supported. We shall not stop to discuss them. The record of the deed to Stuyvesant was objected to for several reasons, but the main one was, that the deed purported to have been executed and acknowledged in New Jersey, and it did not appear that there was any sealed certificate by a clerk to authenticate the due execution of the deed and accredit it as one executed according to the laws of New Jersey.—§ 2 of Act 108, S. L. 1840, p. 166. This objection was well taken. There was no evidence that the certificate of record ever bore an official seal. The law expressly required it, and in the absence of it the certificate was not entitled to recognition. The seal was necessary to verify the act as an official proceeding and meet the requirement of our law. The want of it left the paper without the indispensable attestive symbol, and as a consequence the deed was not fit for record, and the entry of it by the register was not lawful evidence in the case.

The case of *Starkweather v. Martin*, 28 Mich., 471, is cited as authority for the ruling below. That case has no application. There the record contained no specific mark by the register to indicate that the deed itself was sealed by the grantor. The question related to private sealing, and there were many facts tending to show, and taken together amounting to proof, as we thought, that the original deed

POPE V. CUTLER.

was sealed. It was considered an important circumstance that the law was exceedingly vague and tolerant in regard to the mode of private sealing. Finding the proof satisfactory that the original deed must have borne some kind of a device designed as a private seal, we were of opinion that the omission of the register to indicate it by some sign of his own, if in fact there was such an omission when he made his record, was a clerical fault merely, and not sufficient to impair the force of the record. Here the question concerns an official sealing, and there is not only a lack of proof, but the point will not admit of the same considerations. In substance the point is ruled by *Buell v. Irwin*, 24 Mich., 145.

The testamentary proof which was admitted for the purpose of showing that the premises had been devised by Frederick W. Walker to the defendant in error, was not the original will. It purported to be evidence of a copy which had been made in New Jersey and afterwards admitted to probate in Lenawee county in this state under § 4343 C. L., ch. 154, and there was included the evidence of the probate in that county. But there was no evidence that the paper allowed in Lenawee county was accompanied by any foreign probate or foreign authentication to accredit it for probate here. By § 4341 of the same chapter it is enacted that no will shall be effectual to pass either real or personal estate, unless it shall have been duly proved and allowed in the probate court, as provided in the same chapter, or on appeal in the circuit court or supreme court. Then follows provisions for the allowance here of wills proved and allowed abroad, and they make it a prerequisite that the paper to be acted on as a foreign will shall comprise not only a copy of the testamentary instrument as left by the testator, but also the foreign probate and due authentication. The law contemplates all these as forming together the one instrument or subject matter to be acted on, and all are made essential to call the probate court into action and authorize it to exercise jurisdiction. The submission to it

POPE v. OUTLER.

of a paper purporting to be the copy of a foreign will, but without foreign probate or lawful authentication, can have no effect to put its power in motion. The law supposes the presentation of something in the nature of an exemplified record, and the probate and authentication are considered as inseparably belonging to it, and without them the subject matter has no legal shape to answer the requirements of the proceeding. Whether the court of probate had before it these indispensable matters when it assumed to act, we do not know. If it had, they were part of the subject matter and should have appeared with the rest. But as before stated they did not so appear, and upon the face of the proof it would seem there was no jurisdiction in the probate court to order the paper to be allowed as a will. This evidence, therefore, was improperly admitted.

The result is, the judgment should be reversed, with costs, and a new trial ordered.

The other Justices concurred.

The Detroit Savings Bank v. Jane E. R. Burrows.

Banks: Deposits: Adverse claimant: Notice to depositor: Defense. A bank sued by an adverse claimant to money deposited with it, is under no obligation, after having given the depositor timely notice of the proceedings and of the facts on which they are based, to make a strenuous and persistent defense, or to resort to any measures to prevent the cause being brought to trial according to the regular course of the court; the implied obligation of a bank to its depositor to protect the interests of the latter do not go beyond the requirement of good faith in refusing to surrender the moneys confided to its custody except upon a lawful demand lawfully established.

Bankers: Depositors: Claim by third person: Notice to depositor: Negligence. Where the depositor and her attorney had ample notice of the bringing of a suit by another against the bank to recover the deposit, and her agent was present at the trial, failure by the bank to notify such depositor's attorney of the time of the trial, such notice not having been requested, is no breach of duty or evidence of negligence on the part of the bank.

DETROIT SAVINGS BANK v. BURROWS.

Negligence: Application for continuance: Evidence. An omission to apply for a continuance until such depositor should be present to take part in the trial, is held, under the circumstances of this case, not to be negligence on the part of the bank.

Negligence: Evidence: Motion for new trial: Burden of defense. Nor was the failure to move for a new trial upon facts communicated after the verdict to the bank officers and attorney by the depositor's agent, who was present at the trial, negligence. The burden of the defense rested on the depositor and not on the bank, and if a new trial was to be moved for, the duty of taking the necessary steps was upon such agent, instead of awaiting the action of a mere custodian having no interest in the dispute.

Collusion: Evidence: Costs: Prompt payment. The failure to tax costs after judgment in the suit against the bank, and the statement of the plaintiff's attorney in his precept for execution that "the defendant preferred to have an execution, and both parties want it done at once," and the prompt payment of the judgment by the bank, are held not evidence of collusion between the parties to the suit.

Banks: Deposits: Payable to order of third person: Debtor and creditor. The query is suggested, but not decided, whether where moneys are deposited by one on an understanding with the banker that all orders drawn against the deposit are to be to the order of another, the ordinary relation of debtor and creditor is established between the depositor and the banker, or whether such deposit does not leave it open to be determined as a question of fact under all the circumstances whether the money was understood to be deposited to the use of the one or of the other, or for the joint use of the two who were to act in drawing it out.

Heard April 19. Decided June 6.

Error to Superior Court of Detroit.

John H. Bissell, John Atkinson and W. P. Wells, for plaintiff in error, argued, among other things, that the effect of the whole charge was to submit the case to the jury upon the basis substantially of an ordinary deposit made by Mrs. Burrows in her own name and payable to her, while in legal effect the condition that the money should be paid only to the order of Mr. Burrows made it payable to the latter, and that his endorsement of the checks was not a mere mode of withdrawing the money, but a part of the very contract of deposit out of which the liability of the bank to pay the money arose: *Dacy v. N. Y. Chem. Man. Co.*, 5 Hall, 550; *Fulton Bank v. N. Y. & Shar. Canal Co.*, 4 Paige, 127; *Morse on Banking*, 279; that the judgment in the action of Keays against the bank, the plaintiff, in the suit at bar having:

DETROIT SAVINGS BANK v. BURROWS.

had timely notice to defend the same, constituted a bar to her recovery in the present action; that the case comes within the class of cases where a judgment against one party is held to bind another who has notice to defend; that personal judgments conclude the parties to them and their privies: *Bigelow on Estoppel*, 46; that the legal privity which makes the judgment binding on the privity is defined as mutual on successive relationship to the same rights of property: *Greenl. on Ev.*, §189; *Bigelow on Estoppel*, 75; *Freeman on Judgments*, § 162; that its indisputable applications are to cases of vendor and vendee (*Thurston v. Pratt*, 52 Me., 202), of bailor and bailee (*Tarleton v. Johnson*, 25 Ala., 300), and other cases; that the principle is, that a defendant by giving notice to one who is bound to defend makes the latter a privity to the suit, and the opportunity of defense being afforded, the judgment concludes him: see 2 *Philips on Ev.* (*Edwards' Ed.* 1859), 7, 131, notes, 252, 292; 2 *Smith's Leading Cases* (*Ed.* 1873), 801, 802, note to *Duchess of Kingston's case*; *Guidrey v. Jenneaud*, 25 La. An., 634; and that the case of a bank, called upon to defend the title to a deposit against the claim of a third person, and giving the depositor notice to defend, is clearly within the principle.

Moore & Griffin and *F. A. Baker*, for defendant in error.

COOLEY, CH. J:

The facts out of which this controversy arises appear to be the following:

In the fall of 1874 Charles Burrows, the husband of Jane E. R. Burrows, deposited at different times with the Detroit Savings Bank sums which aggregated six thousand seven hundred and twenty-one dollars and ninety cents. On October 12th, 1874, Burrows made a general assignment to one Keays for the benefit of creditors. This assignment was

DETROIT SAVINGS BANK v. BURROWS.

made in Canada, where Burrows had resided and carried on business. Four days after this assignment he called at the bank and drew out all the money standing to his credit, the officers of the bank not being then aware that an assignment had been made. November 2d, 1874, Burrows again appeared at the bank with seven thousand three hundred and seventy-two dollars, which he deposited to the credit of his wife. At the same time he delivered to the bank a paper on which his wife's name was twice written by her, and informed the receiving teller that all checks against the deposit then made were to be drawn to his order. The teller thereupon wrote on the paper on which were Mrs. Burrows' signatures the following words: "All checks will be drawn to order of Charles Burrows." The paper was then pasted into the depositor's signature book, where it afterwards remained. When Mr. Keays ascertained what had been done by Charles Burrows at the bank, he instituted suit against the bank to recover the moneys on deposit, claiming that they had belonged to Charles Burrows, and were transferred to Keays by the assignment. This suit was begun December 23, 1874. Previous to this, however, Mrs. Burrows had drawn out five thousand two hundred and ninety-two dollars, and had gone into the southern states. All her checks had the endorsement of Charles Burrows, except one of forty-two dollars. January 13, 1875, Mrs. Burrows, not being then aware of the suit by Keays, wrote the bank, from Galveston, Texas, enclosing her check for five hundred dollars, not endorsed by her husband, and requesting New York exchange for the amount. January 18, 1875, Mr. Miller, the attorney for the bank, answered her letter, returning the check, and saying: "The check cannot be paid, because your written instructions to the bank are to pay nothing except to the order of Charles Burrows. It is proper to state to you that suit has been instituted against the bank by some person claiming to be the assignee of Mr. Charles Burrows, alleging that the money belongs to him, and that the bank owes it to him. It will therefore

DETROIT SAVINGS BANK v. BURROWS.

be necessary for you to see that your rights are protected by counsel here. The bank cannot assume any expense in defending the case." On receipt of this letter (but on what precise day is uncertain), Mrs. Burrows wrote to Mr. Moore, a member of the bar in Detroit, advising him of the suit, asserting her exclusive right to the moneys, and saying: "I will thank you to call upon the manager of the Detroit Savings Bank and protect my interest." Mr. Moore received this letter about February 24, 1874. He immediately called on the cashier of the bank and ascertained the condition of the claim and of the suit. He also called on Mr. Miller and Mr. Bissell, then acting for the bank as attorneys in the Keays suit. Being interrogated as to whether he directed the firm of which he was a member to look to the interest of Mrs. Burrows in the transaction, he replied: "I didn't assume any responsibility at the time in relation to it. If you will permit me to state what took place, I said to Mr. Miller, I know nothing about this transaction; you can defend, and you had better defend, or something of that kind; that is, saying he knew all the facts and he could defend to better advantage for her than any body else; I did not assume any responsibility about it." He added that he did nothing further in relation to the suit except to write Mrs. Burrows fully, under date of February 24, 1875, stating the facts in regard to the suit; intimating that the deposit by Burrows under the circumstances in his wife's name, but payable to his order, was suspicious, though subject to explanation, and concluding as follows: "It will be necessary for you, however, to see that a defense is interposed, in order to prevent their getting possession of the money. Will you please state on the receipt of this what you can show about your ownership of the money, and when you may probably be here to make such proof as may be necessary?" This letter was answered by Mrs. Burrows from Vicksburg, Miss., March 26, 1876, the answer stating that she received the letter in Cuba, and should be home in a few days to explain all.

DETROIT SAVINGS BANK v. BURROWS.

Mrs. Burrows appears to have had another agent in Detroit with some authority to look after this suit for her. This was George J. Stocks, to whom both Mr. and Mrs. Burrows had written on the subject. Stocks called on Mr. Bissell and communicated with him in regard to the suit, and he was present at the trial, which took place March 23, 1874. For some purpose which is not explained Stocks was called as a witness for Keays, and was cross-examined at length by Mr. Bissell. It does not appear that Stocks, or any one else, on behalf of Mrs. Burrows, took any steps to procure a continuance of the cause. Keays obtained a judgment against the banks upon which an execution was taken out the next day, without taxing any costs, and the amount was immediately paid. Stocks testified that after the trial he had a conversation with Mr. Bissell, and put him in possession of certain important facts, which, however, are not set forth in this record. This testimony was put in as having some bearing on the question of diligence on the part of the bank in making defense; it being conceded that no steps were taken on the part of the bank to obtain a new trial.

When Mrs. Burrows returned and found that judgment had been obtained against the bank and had been paid, she employed an attorney and proceeded to the bank to make demand for the money. For this purpose she drew her check for two thousand and eighty dollars, payable to the order of the attorney, and the attorney presented it. The bank refused payment, and this suit was then brought.

In submitting the case to the jury the judge was requested to instruct them that on the evidence the plaintiff was not entitled to recover, but this was declined. He was also requested to instruct them that there was no evidence tending to show collusion between Keays and the bank, and that the jury would not be justified in inferring it; but this was also declined. The question whether the money really belonged to Mrs. Burrows was submitted on conflicting testimony. And the instructions left the jury at liberty to infer negligence on the part of the bank in defending the

DETROIT SAVINGS BANK v. BURROWS.

Keays suit, if they should be of opinion that negligence was shown.

In order to determine what evidence of negligence there was for the jury to act upon, it is necessary to consider what the officers of the bank did and what they refrained from doing. They certainly do not appear to have entered into a strenuous and persistent contest with Keays, or to have resorted to any measures to prevent the cause being brought to trial according to the regular course of the court. But were they bound to do so, and if so, on what grounds? Certainly not from any pecuniary interest in the controversy, for it was legally a matter of indifference to the bank whether the moneys should be paid to Keays or to Mrs. Burrows. Moreover the latter had not in any way indemnified the bank for contesting the claim of Keays, and the defense, so far as appears, was being conducted at its own expense. There were no peculiar obligations resting upon the bank to protect the interest of Mrs. Burrows, except such as must be implied in the case of every depositor; and these do not go beyond the requirement of good faith in refusing to surrender the moneys confided to the bank except upon a lawful demand lawfully established. Indeed, there were in this case some presumptions against the claim of Mrs. Burrows that were very well calculated to favor the claim of Keays in the mind of any one familiar with the facts; presumptions springing from facts which the attorney of Mrs. Burrows had very properly informed her looked suspicious. It is not at all unlikely that the officers of the bank regarded the claim of Mrs. Burrows as unfounded, and possibly they were influenced by some impressions to that effect in abstaining from a more vigorous and determined defense.

It appears, however, that the bank officers notified Mrs. Burrows of the suit in time to enable her attorney and her agent to take steps to make defense in her behalf if they deemed it advisable. It is fully shown by the evidence, that both the attorney and the agent had conferences with

DETROIT SAVINGS BANK V. BURROWS.

the officers of the bank in regard to the suit, and it is not charged that information of any facts important for them to know was kept back. It is said the attorney was not informed when the cause was to be tried, but it is a sufficient answer to any complaint on that score, that he did not request or desire to be informed, but expressly left the whole matter in the hands of the attorneys for the bank. Moreover, the agent of Mrs. Burrows was informed of the trial, and it was his business, rather than that of the bank, to notify Mr. Moore if his presence at the trial was desired. It may be said the bank should have procured an adjournment of the case until Mrs. Burrows should return, and it is certainly remarkable that no continuance was applied for. But if there was any negligence in not making such an application it was, presumptively at least, not the negligence of the bank, but of the agent, Stocks. Stocks might perhaps have made the necessary affidavit of merits for a continuance, but there is no showing or intimation that any one connected with the bank could have done so. What they knew of the facts was this: A bankrupt who had a few days previously drawn a large sum of money from the bank, to which he had no right either legally or morally, had made the deposit in dispute in the name of his wife. At the same time he had made provision for securing to himself the benefit of the deposit, by directing that payments should be made only to his order. The bank might very well believe that presumptively this arrangement was a device in fraud of the bankrupt's creditors; and while the circumstances mentioned would by no means be conclusive on that point, they would be sufficiently strong to make one who knew nothing more of the facts than this hesitate to make oath to a belief in the justice of Mrs. Burrow's claim, or to either Mr. or Mrs. Burrows being able to testify to facts which could support it. But it is not necessary to discuss this. It is sufficient to say that the application for delay ought properly to have come from

DETROIT SAVINGS BANK v. BURROWS.

Stocks rather than the bank, and that the former, if any one, ought to have been able to make the necessary affidavit for moving successfully.

It is not claimed that the bank kept back any facts on the trial. It is suggested, however, that there was negligence in not making use of the facts communicated by Stocks to Bissell as the foundation for an application for a new trial. But here the question arises, whose duty it was to move for a new trial. The argument on this branch of the case appears to assume that the bank, because it had been made by one party the custodian of a fund which another claimed, was bound to take upon itself the whole burden of the contest on behalf of the party from whom the fund had been received. But nothing could be more unreasonable or more inequitable. The burden of defense properly rested upon Mrs. Burrows; if any new trial was to be moved for after the verdict, her agent should have taken steps for that purpose instead of awaiting the action of a custodian which could have no interest in the dispute.

But the statement of Stocks on this branch of the case is somewhat singular, to say the least. He was put upon the stand as a witness by Keays, and was cross-examined at considerable length. If he knew any facts which would benefit Mrs. Burrows, it is most extraordinary that he did not divulge them there, instead of waiting to make them the ground for a new trial. Nay, it was extraordinary that he did not previously put Mr. Bissell in possession of them, so that the latter might prepare for trial with such aid as the facts might afford him. So far as we can see, the charge of negligence justly lies not at the door of any one connected with the bank, but at the door of Stocks, who neither as agent for Mrs. Burrows, nor as witness against her, was impelled to make that complete disclosure which the interest of his principal and the cause of justice would appear to have demanded of him in both capacities.

There is a like entire absence of evidence of collusion between the bank and Keays. The only specific facts to

DETROIT SAVINGS BANK v. BURROWS.

which we are pointed as evidence of collusion are the following:

1. No costs were taxed for Keays on his judgment against the bank.

2. The attorney for Keays called for execution immediately, stating in his precept that "the defendants in the case prefer to have an execution in the case. Both parties want it done at once. Please see to it right off, as it is quite important to both parties to avoid delay."

3. The conversation between Stocks and Bissell after the trial, in which the former claims to have communicated important facts, of which Bissell made no use.

4. The prompt payment of the money by the bank.

What the attorney for Keays may have said is manifestly not evidence against the bank, and may be dismissed from consideration. The communication from Stocks to Bissell seems to call for no further remark than this: that if it evidences bad faith in any one it would be in Stocks rather than in Bissell. The other facts which are relied upon at the utmost prove nothing more than that the bank and Keays were trying in an amicable suit the right of the latter to the money which the former held. There was nothing suspicious in this; it was entirely proper that the suit should be conducted amicably, and proper also that if the bank interposed no technical or vexatious defenses, and allowed the case to come to a hearing on the merits according to the ordinary course of the court, no costs should be taxed against it. In justice no costs ought to have been taxed.

Collusion in such a case implies a secret or dishonest arrangement in fraud of the rights of another. In this case it might have been shown either,

1. In keeping Mrs. Burrows in ignorance of the proceedings until judgment should have been obtained; or,

2. In concealing or in mis-presenting the facts upon which the trial was to be had.

We do not learn that either the one thing or the other is chargeable to the bank in this case. Mrs. Burrows was

DETROIT SAVINGS BANK v. BURROWS.

actually represented at the trial by her agent, and the only concealment of facts that is shown was by the agent himself. Whether the facts concealed were material we cannot say, as we have only the word of Stocks for it; but assuming that they were, they do not charge the bank with either *mala fides* or negligence.

A careful examination of the record leads us irresistibly to the conclusion that the judge erred in not charging the jury that on the facts the plaintiff below was not entitled to recover. The judgment must therefore be reversed, and a new trial ordered.

We have not deemed it proper to discuss the question whether when moneys are thus deposited by one person on an understanding with the banker that all orders drawn against the deposit are to be to the order of another, the ordinary relation of debtor and creditor is established between the depositor and the banker. Had the understanding been that the husband himself should draw for the money, probably he must have been considered the creditor.—*Lilly v. Hays*, 5 A. & E., 548; *Malcolm v. Scott*, 6 Hare, 570. But this case was peculiar in that the action of both wife and husband was requisite to draw out any moneys under the directions given. We have found no case which undertakes to explain what the legal position of the parties is under such an arrangement, but we should say that the most Mrs. Burrows could claim would be, that it was a question of fact under all the circumstances whether the money was understood to be deposited for her use, or for that of her husband, or for the joint use of the two who were to act in drawing it out.—*Gibson v. Minet, R. & M.*, 68; *S. C.*, 1 C. & P., 247.

GRAVES and MARSTON, JJ., concurred.

CAMPBELL, J., did not sit in this case.

HATHAWAY v. MITCHELL.

Adeline K. Hathaway v. Jacob Mitchell and another.

Equity jurisprudence: Mill-dams: Abatement: Right of flowage: Purposes.

A court of equity will not interfere to protect complainant from an injury that defendants can at any time make lawful if they choose; therefore a showing of a subsisting right of flowage for saw-mill or grist mill purposes will prevent the abatement of a mill-dam erected to supply a paper mill and causing only the like extent of flowage.

Mill dams: Grants of right of flowage: Quantity: Use.

A grant conveying the right to keep up a mill-dam at a specified height, and imposing no restrictions on the use, cannot be confined to the use then presently contemplated.

Right of flowage: Grant in fee: Restrictions: Construction.

While it is competent for grantors to limit the right of flowage to particular purposes, a grant in fee simple, as a general rule, cannot be restricted except by plain conditions.

Grant of right of flowage: Quantity: Change of use.

The grant in question in this case is held to be in legal effect a grant of a certain quantity of water power, and the fact that it was to be immediately used for particular ends is not inconsistent with a change of uses, where no change is forbidden.

Heard April 19. Decided June 6.

Appeal in Chancery from Lenawee Circuit.

Greenly & Stearns and *A. L. Millard*, for complainant, argued that the grants to Avery and to Goulding & Morse are both by their express terms limited to the use of the flouring mill then on the premises, and confer no right to use the water for another and different purpose; that when the words used will admit of one construction which would limit the use to a particular purpose, and another which would allow the use specified to be merely a measure of the quantity to be used, the courts incline to the latter construction as being most favorable to the grantee, but this rule has no influence where the intention of the parties is clearly expressed in the written agreement: *Angell on Water Courses* (6th ed.), § 149 and note 3; *Deshon v. Porter*, 38 Me., 289; *Tourtellot v. Phelps*, 4 Gray, 374; *Ashley v. Pease*, 18 Pick., 268; *Bigelow v. Battle*, 15 Mass., 313; *Rogers v. Bancroft*, 20 Vt., 250; *Johnson v. Rand*, 6 N. H., 22; *Strong v.*

HATHAWAY v. MITCHELL.

Benedict, 5 Conn., 210; *Garland v. Hodgson*, 46 Me., 511; and that in giving construction to such grants, the situation of the parties, the subject matter of their transaction, the surrounding circumstances, and the whole language of their instrument, should be considered: *Sumner v. Williams*, 8 Mass., 162; 2 *Parsons on Cont.*, 11; *Deshon v. Porter*, *supra*; *Angell on Water Courses*, § 148; *Kennedy v. Scovil*, 12 Conn., 317; *S. F. M. Co. v. Portsmouth Co.*, 46 N. H., 249; *S. N. Co. v. Moore*, 2 Whart., 477; that a court of equity has jurisdiction in cases like this (being a private nuisance), and may not only restrain a threatened injury by injunction, but may remove or abate when the nuisance has been erected: *Angell on Water Courses*, § 444, *et seq.*; *Bemis v. Upham*, 13 Pick., 169; *Bardwell v. Ames*, 22 Ib., 333; *Van Bergon v. Van Bergon*, 2 J. C. R., 272; 1 *Green (N. J.) Ch.*, 57; *State v. Mayor of Mobile*, 5 Porter (Ala.), 279; and that complainant should not be required first to establish her right at law unless it be doubtful: *White v. Forbes*, Walk. Ch., 112; 2 *Story Eq. Jur.*, §§ 927-9.

Stacy & Underwood, for defendants, argued that it is necessary to the existence of an easement that there be both a dominant and a servient estate: *Dark v. Johnston*, 55 Penn. St., 164; 2 *Wash. R. P.*, 25, § 4 and cases cited; *Wolfe v. Frost*, 4 Sandf. Ch., 71; *Grant v. Chase*, 17 Mass., 443; *Seymour v. Lewis*, 13 N. J., 450; and the recitals in the deed to Avery show that the Palmyra mill property was the property to which the easement granted was intended to be appurtenant; that courts will so construe a deed as, if possible, to give it effect, and will construe it most favorably to the grantee: *Jackson v. Hudson*, 3 Johns., 375; *Jackson v. Gardner*, 8 Johns., 394; *Collins v. Lavelle*, 44 Vt., 230; *Rogers v. Bancroft*, 20 Vt., 250; that the Avery deed was a grant of a right to flow the lands of complainant

HATHAWAY v. MITCHELL.

by means of a dam upon the Palmyra mill property, and there bring no restriction as to locality, it might be built anywhere in the river adjacent to the mill property, and accompanying such right would be the privilege at all reasonable times to enter upon the lands of the grantor to build, rebuild or repair the dam: *Ang. on Water Courses*, §§ 158, 358; *Pomfret v. Rycroft*, 1 *Saund.*, 323; *Hodgson v. Field*, 7 *East*, 622; *Frailey v. Waters*, 7 *Barr.*, 221; that the right or easement acquired by such deed would and did pass with the dominant estate to and vest in the defendants by virtue of the mesne conveyances: *Underwood v. Carney*, 1 *Cush.*, 255; *Karmuller v. Katz*, 18 *Ia.*, 352; *Neaderhauser v. State*, 28 *Ind.*, 257; *Rockley v. Sprague*, 17 *Me.*, 281; *Morse v. Hutchinson*, 9 *Vt.*, 242; *Pickering v. Staples*, 5 *S. & R.*, 107; *Woolen Factory v. Batchelder*, 3 *N. H.*, 190; *Philbrick v. Ewing*, 97 *Mass.*, 133; that the language used in the limitation in the deeds in question here, contemplates a restriction in quantity rather than in the use: see *Kales v. Braman*, 49 *Me.*, 207; *Ashley v. Pease*, 18 *Pick.*, 268; *Bigelow v. Battle*, 15 *Mass.*, 312; *Jewett v. Jewett*, 16 *Barb.*, 150; *Cromwell v. Selden*, 3 *N. Y.*, 253; *Pratt v. Lamson*, 2 *Allen*, 275; *Borst v. Empire*, 5 *N. Y.*, 33; *Garland v. Hodgson*, 46 *Me.*, 511; that while equity will frequently interfere to restrain the threatened erection of a dam, it is loath to determine a disputed right and destroy a dam already erected: *Coe v. Lake Co.*, 37 *N. H.*, 254; *Burnham v. Kempton*, 44 *N. H.*, 78; *Reid v. Gifford*, 6 *Johns. Ch.*, 19; *Van Bergon v. Van Bergon*, 3 *Johns. Ch.*, 282; that upon complainant's construction of the grants in question defendants are entitled to maintain their dam, but may be restricted in the use to which they may put the water, and the case made by the bill therefore does not warrant the relief prayed, see *Jones v. Wells*, 31 *Mich.*, 170.

HATHAWAY v. MITCHELL.

CAMPBELL, J :

Complainant, who is a riparian owner of land on the River Raisin, filed her bill to abate a mill-dam erected by defendants to supply their paper mill further down the river. The mischief complained of is, that her land is overflowed, and that the stream is so diverted that so much of her land as lies below the dam (which is at an ox-bow), is deprived of the natural fence it derived from the stream in its primary condition.

In 1849, at the lower point of the bend, and below complainant's land (then owned by her husband), a saw-mill stood on the left bank, belonging to one Spalding, and a flouring mill on the right bank, nearly opposite, belonging to John S. Avery. Both mills were supplied from one dam near the saw-mill. A controversy having arisen concerning the right of flowage, George A. Hathaway and complainant, his wife, on the 8th of November, 1849, made a deed to John S. Avery, reciting their ownership on the opposite sides of the river, and Avery's owning premises "formerly called the Palmyra mill property," and proceeding as follows: "And whereas, the said John S. Avery is desirous of acquiring the undisputed right to use the water in said stream, and to flow the lands in and near the same, so far as may be necessary for the purpose of furnishing a full supply of water for the profitable use of his flouring mills erected on the property first above mentioned: Now, therefore, we, the said George A. Hathaway and Adeline K., his wife, in consideration of one hundred and fifty dollars to us in hand paid by the said John S. Avery, the receipt whereof is hereby acknowledged, have granted, bargained, sold, released, and confirmed, and by these presents do grant, bargain, sell and confirm, unto the said John S. Avery, his heirs, executors, administrators and assigns, all the water of said stream which may or can be used as aforesaid, and also the unlimited right to flow the lands aforesaid, or any part thereof, in or near said stream, as far as may be necessary for the purpose

HATHAWAY v. MITCHELL.

aforesaid." [Then follows a release of previous damages.] "To have and to hold the said easement and privilege to the said party of the second part, his heirs and assigns forever, as appurtenances belonging to his and their lands as aforesaid." There was a clause providing that the release should not enure to Spalding's benefit for his saw-mill.

On the 2d of December, 1850, Hathaway gave to Spalding a release of all damages to which the maker then was or might thereafter be entitled, occasioned by the keeping up by said Spalding of the mill-dam at Palmyra at the same height at which it had been raised theretofore at any time.

In 1864, the dam having been partly destroyed by water, the then owner of the Palmyra mill obtained leave from Hathaway to put a temporary dam across the river higher up, and where it would abut at one end on complainant's property. On the 11th of February, 1869, Hathaway and wife conveyed to Burr Goulding and Asa W. Morse, then owning the premises, "the right to use the land lying adjacent to and upon the River Raisin, on sections fifteen and twenty-two, in township seven south, of range four east, at the place and below where the dam of the Palmyra mills is now located, for the purpose of attaching or affixing a dam for said mills, including the dam now in use and the flowage caused or to be caused thereby. Also the right to at all times enter upon said lands, for the purpose of building, rebuilding or repairing said dam or dams."

In 1871 this dam was partly carried away, and as the mills were burned in 1870, there was nothing done to renew or repair the work until, just before the bill was filed in 1874, the dam was rebuilt to supply a paper mill built by defendants, who have succeeded to the saw-mill and other mill property formerly served by the water power.

The complainant claims that the easement, whatever it was, was confined to a flouring mill, and is extinguished.

The evidence shows that the damage done to complainant is no more than would have been done by either of the old dams.

HATHAWAY v. MITCHELL.

There is nothing in the case to show any extinguishment of the saw-mill right of flowage, which is now vested in defendants, and whether confined to a saw-mill or not, it certainly would justify the maintenance of a dam for that purpose whenever defendants should see fit to build one. This being so, a court of equity will not interfere to protect complainant from an injury that defendants can at any time make lawful if they choose. But we think, so far as this record shows, the right cannot be thus restricted. It gave Spalding the right of keeping up the mill-dam at its former height, and imposed no restrictions on its use.

But we also think the grant to Goulding & Morse is equally unrestricted. It was to be for the Palmyra mills. The original grant to Avery, although it had given no express right of abuttal on complainant's grounds, and although it was for the purpose of furnishing a full supply of water for the profitable use of his flouring mills, did not in words restrict the use of the water to any particular purpose. It was a grant of all the water which "may or can be used as aforesaid," and a right to flow "so far as may be necessary for the purpose aforesaid." But it was made expressly a grant in fee simple as an appurtenance belonging to the lands of the parties to the conveyance.

It is no doubt competent for grantors to limit the right of flowage to particular purposes. But it is a general rule that a grant of an estate in fee simple cannot be restricted except by plain conditions. It does not appear from these deeds, or from any other source, that the parties had any occasion or desire to limit the use of the water power to any specific purpose. The grantors reserved no use for themselves, but gave the grantees all the power created by the dam. Inasmuch as the grantors were farther up the stream than the grantees, it did not concern them what became of the water after reaching the mills, and a use for one purpose was of no more importance to them intrinsically than a use for another. The grant, taken together, is expressly a grant of a certain quantity of water power, and the fact

HATHAWAY v. MITCHELL.

that it was to be immediately used for particular ends is not inconsistent with a change of uses, where no change is forbidden. In *Mandeville v. Comstock*, 9 Mich. R., 536, the grant was of a certain number of square inches under a certain head and fall, to be used for "the purposes only of a cabinet shop and the business connected therewith, and also furnace operations." There the restriction was plainly expressed, and yet even there, the doubt as to a subsequent removal of the restriction was held sufficient to exclude relief in equity. The present case can only be sustained by assuming that a restriction was meant, which is inconsistent with a fee simple, and only to be inferred from language which at best is very ambiguous. We think, on the whole, that no such restriction can be deduced from the conveyances.

There is therefore no ground for equitable interference, as there would be none if the construction were different, inasmuch as the right would still exist to flow the lands for saw-mill and grist-mill purposes.

The bill was rightly dismissed, and the decree must be affirmed with costs.

The other Justices concurred.

The City of Detroit v. Jacob Martin.

Assessments: Threatened sale: Cloud upon title: Payment under protest: Recovery. Where sale of one's land is threatened upon an assessment against him, the test whether he may safely pay under protest to prevent the sale, and afterwards sue to recover back the money so paid, seems to be whether the sale, if made, would constitute a cloud upon the title.

Clouds upon title to lands: Void tax sale. A cloud upon title to lands is something which constitutes an apparent defect or incumbrance, something that *prima facie* shows some right of another either to the whole or some interest in it; and a sale to satisfy an alleged tax which has no semblance of legality, but is totally void on its face, would not cast a cloud upon the title.

DETROIT v. MARTIN.

Assessments: Unconstitutional statute: Sale: Cloud upon title. One who has full knowledge of all the facts, being conclusively presumed to know the law, is presumed to know that an assessment laid under a statute which is unconstitutional and void cannot be made the basis of a sale that could constitute any cloud upon his title, and therefore to know that he could not be injured by it.

Void tax: Threat to enforce payment: Voluntary payment. A threat to enforce payment of such a tax, no seizure of goods or of the person having been made, or threatened, or authorized, where the officer has no authority to compel payment otherwise than by sale of the land, which could injure no one, would not constitute a payment made in consequence thereof any thing but a voluntary payment.

Protest: Voluntary payment. A protest cannot alone change what would otherwise be in law a voluntary payment into an involuntary one, or change the rights of the parties; and one paying voluntarily under a claim of right cannot afterwards recover back the money, although he protested at the time against his liability.

Heard April 19. Decided June 9.

Error to Superior Court of Detroit.

D. C. Holbrook, for plaintiff in error, cited: *Fleetwood v. City of N. Y.*, 2 Sandf., 485; *Forrest v. Mayor of N. Y.*, 13 Abbott, 352; *N. Y. & H. R. R. Co. v. Marsh*, 12 N. Y., 308; *Lott v. Swezey*, 29 Barb., 87; 11 N. Y., 99; *Cooley on Taxation*, 565-70.

Brennan & Donnelly and *G. V. N. Lothrop*, for defendant in error, cited: *Nicodemus v. East Saginaw*, 25 Mich., 456; *First Nat. Bank, etc., v. Thayer*, 21 Mich., 483; 2 Dillon Mun. Corp., 855 and notes; *Jenks v. Lima*, 17 Ind., 226; *Preston v. Boston*, 12 Pick., 7; *Cook v. Boston*, 9 Allen, 393; 13 Gray, 476; *Baker v. Cincinnati*, 11 Ohio, 534; *Taylor v. Board of Health*, 31 Penn., 73; *Green v. School Dist.*, 57 Penn. St., 423; *Cooley on Taxation*, 565-70; *Atwell v. Zeluff*, 26 Mich., 118; *McKee v. Campbell*, 27 Mich., 497; *Loud v. Charleston*, 99 Mass., 208; *Arnold v. Cambridge*, 106 Mass., 352; *Hunnewell v. Boston*, Ib., 350; *Hays v. Hogan*, 5 Cal., 241; *Falkner v. Hunt*, 16 Cal., 167; *Guy v. Washburn*, 23 Cal., 113; *Dillon Mun. Corp.*, 841 and note.

DETROIT v. MARTIN.

MARSTON, J.:

Plaintiff below, defendant in error, was the owner of a certain lot in the city of Detroit upon which there was assessed ninety-six dollars and fifty-four cents on account of the opening of Labrosse street in said city. After the assessment was made he received a written notice signed by the city attorney notifying him of the fact and requesting him to pay the amount thereof within sixty days from the date of service of the notice, and that in case of failure, at the expiration of that time the property so assessed would be advertised and sold by the receiver of taxes of said city to pay said assessment. After the expiration of the sixty days, and on the 3d of March, 1874, he paid said assessment, to prevent the threatened sale, under protest, and had the protest entered upon the books of the treasurer. Plaintiff remonstrated against the opening of said street, and prior to the commencement of suit in this case petitioned the common council of said city to repay him the amount with interest, which was refused. The provision of the city charter under which said assessment was levied and collected was by this court, at the June term thereof, 1875, declared unconstitutional, in the case of *Paul v. The City of Detroit*, 32 Mich., 108.

Plaintiff brought assumpsit to recover back the amount so paid, and the above facts were found by the jury in a special verdict, upon which judgment was rendered for the plaintiff. The city brought error, alleging that the payment was a voluntary one; that plaintiff was not entitled to recover, and that the facts found did not sustain the judgment.

As the case has been presented in this court upon the question whether the payment was voluntarily made or not, it would be well for us to understand clearly, not only the circumstances under which the money was paid, but the legal result or effect upon plaintiff's rights in case he had

DETROIT v. MARTIN.

not paid this money, as by so doing we will be better enabled to determine the question submitted.

Plaintiff was the owner of the lot assessed. The amount assessed thereon was illegal and void, the statute under which such assessment was made having been unconstitutional. The city, through its proper officers, threatened to sell the lot if the assessment was not paid. To prevent this threatened sale the money was paid under protest. Such are the facts in brief.

If not paid and the property sold, what would have been the legal effect of such sale?

If plaintiff had not paid, we may assume the threat would have been carried out and the property sold. How would such sale have affected plaintiff's right or title thereto? Would such sale have constituted a cloud upon his title? Assuming that it would, in order to prevent this, he could have paid the amount under protest, and afterwards have maintained an action to recover it back. If a sale under the facts stated would not have constituted a cloud upon his title, then it may be at least doubtful whether the plaintiff has any remedy, as it is not pretended there was any fraud, duress or seizure of his goods, either actual or threatened, or that the officers of the city had any authority to seize them. "A cloud upon one's title is something which constitutes an apparent incumbrance upon it, or an apparent defect in it; something that shows *prima facie* some right of a third party, either to the whole or some interest in it. An illegal tax may or may not constitute such a cloud. If the alleged tax has no semblance of legality, if upon the face of the proceedings it is wholly unwarranted by law, or for any reason totally void, so that any person inspecting the record and comparing it with the law is at once apprised of the illegality, the tax, it would seem, could neither constitute an incumbrance nor an apparent defect of title, and therefore in law could constitute no cloud."—*Coolley on Taxation*, 542.

Under the facts found in this case, and the law applica-

DETROIT v. MARTIN.

ble thereto, the sale and conveyance thereunder would not have constituted a cloud upon plaintiff's title, even although by the charter assessments may be declared a lien upon the land, and the conveyance *prima facie* evidence of the regularity of the proceedings, because from an inspection of the conveyance, which would recite the proceedings, and of the record, it would at once appear that the assessment was wholly unwarranted by law and totally void.

The plaintiff, at the time he paid this tax, paid it with full knowledge of all the facts and circumstances. He is conclusively presumed to know the law applicable thereto. He is presumed to have known at the time he paid this tax that the statute under which the assessment was made was void, and that a sale of the premises therefor would constitute no cloud upon his title, and that he could not be injured by such sale.

Such being the legal conclusion from the facts found, was the payment voluntary or involuntary?

There is no doubt but that where the parties do not stand upon equal terms, as where the person making the demand has the goods of another and refuses to deliver them except upon payment of an illegal exaction, as in *Parker v. The Great Western Railway Co.*, 7 M. & G., 253; or where the plaintiff was entitled to a license, and the defendant to grant it, but refused to deliver it except upon payment of a sum of money he was not entitled to, as in *Morgan v. Palmer*, 2 B. & C., 729; or where the payment is made to release personal property from seizure, either actual or threatened, where the person making the threat has the then present ability to make good his threat, as in *Atwell v. Zeluff*, 26 Mich., 118; and perhaps where a sale of the real estate assessed would constitute a cloud upon the title,—in all such cases, the party pays under compulsion and may afterwards in an action of assumpsit recover back the amount of the illegal exaction.

The plaintiff, however, does not bring himself within the principles of any of these cases. He knew all the facts at

DETROIT v. MARTIN.

the time he made the payment; none of his property was held by the party making the demand; no seizure had been made or threatened, nor did it appear that the officer making the demand, or that any officer, had the power to compel in any way payment of the amount, except by a threatened sale of the property assessed, and which if carried out could injure no one, unless it might have been the purchaser. The threat therefore was a harmless one. It could not have alarmed the plaintiff, as it could not have affected his rights. If carried out, the sale would have had no force, and the conveyance thereunder no validity. The assessment was a mere nullity, and could not have been enforced in any way, there being no statute authorizing it. Yet the plaintiff, knowing all this, voluntarily went to the treasurer's office and paid the amount claimed. The case "stands on no higher ground than it would if the plaintiff, when the tax was demanded of him by the collector, had said to him: 'I know your tax is illegal and void; I am under no obligation to pay it, but I shall pay it under protest, and with an intention to sue for and recover it.'"

* * * All the authorities agree that money paid under such circumstances cannot be recovered."—*Sheldon v. South School District*, 24 Conn., 91; *Bulkley v. Stewart*, 1 Day, Conn., 133.

Where taxes had been levied under an unconstitutional statute, demanded and paid for a series of years, and the statute being then held void, suit was brought to recover the amount paid, *Lowrie, J.*, said: "We state the case as one of a voluntary payment of taxes, because there is no pretense that the defendant's officers did any more than demand the tax under a supposed authority of the law; and there is no more a compulsion than where an individual demands a supposed right. The threat that is supposed to underlie such demands is a harmless one: that in case of refusal, the appropriate legal remedies will be resorted to. It is supposed that there was real compulsion, because no certificate would be granted by the health officer to the ships

DETROIT v. MARTIN.

without the payment of the tax, and without the certificate no entry would be allowed by the custom house officers. If this be the compulsion relied on it is vain, for it proceeded from the federal officers, and not from the defendant, who could have nothing to do with it.—*Taylor v. Board of Health*, 31 Pa. St., 73.

In *Forrest v. The Mayor, etc.*, 13 Abbott, 351, an assessment was made upon real estate for constructing a sewer. The money was allged to have been paid on compulsion and under protest. Afterwards the assessment upon the real estate was set aside for fraud and illegality. An action was then brought to recover back the money paid. On demurrer the court held, that the compulsion mentioned must be considered to refer to the inconvenience the owner encountered in using his lots by selling or mortgaging them; that no facts were mentioned which showed compulsion; that it was difficult to suppose any actual compulsion could be used in respect to real estate. And the court there held, there being no allegation that the plaintiffs were under any mistake or ignorance of the facts when they paid the money, it must be considered as a voluntary payment on their part, received by the defendant under a claim of right, and that they could not recover it back.

This case has been followed and approved in that state.—*Fleetwood v. The City*, 2 Sandf., 475; *Lott v. Sweezy*, 29 Barb., 87; *The N. Y. & Harlem R. R. v. Marsh*, 2 Kern., 308 (in this last case the officer making the demand had no power to then enforce it, owing to the place where the demand was made); *Union Bank v. New York*, 51 Barb., 159; see further as to voluntary payments: *Cooley on Taxation*, 566, and authorities cited; *Broom's Legal Maxims*.

If under the circumstances in this case the plaintiff could recover, I do not see what there would be to prevent parties from in all cases voluntarily paying their taxes under protest, and if at any time afterwards, within the statute of limitations, it was discovered, or decided by a court of competent jurisdiction, that the statute under which they were levied

DETROIT V. MARTIN.

was illegal, then bringing an action and recovering them back again. The consequences of such a doctrine, to say the least, would be very serious.

What effect then does a protest made at the time have? Under the circumstances of this case it has none. It cannot make a payment otherwise voluntary involuntary. "A party who has paid voluntarily under a claim of right, shall not afterwards recover back the money, although he protested at the time against his liability."—*Shaw, C. J.*, in *Preston v. Boston*, 12 Pick., 13; *Lee v. Inhabitants, etc.*, 13 Gray, 479.

Where money is illegally demanded, but under a claim of right, and the payment is an involuntary one, the protest is a notice to the person to whom the payment is made that the person paying does not acquiesce in the illegal demand, and thereby surrender up any right he may have to recover back the money. Besides, a payment without protest would prevent the party afterwards from recovering interest in an action brought to recover back the amount paid.—*Atwell v. Zeluff*, 26 Mich., 120. The effect of a protest beyond this, if any, may not be very clear or well settled.

We have examined the California cases cited and relied upon by counsel for defendant in error. The case of *Guy v. Washburn*, 23 Cal., 113, relies entirely, without any discussion, upon the two previous cases of *Falkner v. Hunt*, 16 Cal., 167, and *Hays v. Hogan*, 5 Cal., 241. *Falkner v. Hunt* was a case of an assessment upon personal property. In *Hays v. Hogan* an excessive tax was levied upon real estate. The act under which the municipality was organized provided that if any person failed to pay any tax levied upon real or personal property, the town collector might recover the same in a suit, in the name of the corporation, before any court of competent jurisdiction. No such suit was commenced. The property, real estate, was summarily sold, and the plaintiff became the purchaser. The court said: "The right of the plaintiff to recover, under the circumstances, is undoubted. He protested against the sale, purchased in order

DETROIT v. MARTIN.

to protect his property from a clouded title, and made the payments under protest, and in a few days afterwards commenced his suit for the recovery of the money. * * * Even supposing that the plaintiffs were not the owners of the property, then it would follow, that as the sale was wholly unauthorized and void, as purchasers they could take nothing, and therefore may recover the money sued for, under the count for money had and received." It will be seen that this case is put upon two grounds: *first*, a purchase to protect his property from a clouded title; and *second*, the sale, if void, as purchasers they could take nothing, and might recover back the money paid. The case has no application to the one before us.

In a late California case, not referred to by counsel, where property was assessed for widening a street, to a stranger, and the true owner, with a knowledge of the facts, but under a misapprehension or an ignorance of the law, paid the tax under protest, to avoid a threatened sale of the property by the collector, the court held it was to be deemed a voluntary payment, and that he could not recover back the money in a suit against the collector.—*Bucknall v. Story*, 46 Cal., 589.

In the late Massachusetts cases referred to (*Loud v. Charlestown*, 99 Mass., 208; *Arnold v. Cambridge*, 106 Mass., 352, and *Hunnewell v. Charlestown*, Id., 350), the facts are not very fully set forth, and the court does not discuss the question at length, but relies upon and follows the case of *Boston & Sandwich Glass Co. v. Boston*, 4 Met., 181. In this case it would seem that had the tax not been paid, the collector had authority to enforce payment, and such is the reasoning of the court in deciding the case. The court says, the parties do not stand on equal terms, therefore the payment was not voluntary; that the case belongs to a class where the payment is made upon an illegal demand, by one who has authority to levy upon the property of the person upon whom such demand is made, and by a sale of such property to satisfy and discharge such claim; and that

DETROIT V. MARTIN.

where payment is made upon such a demand, to prevent such seizure and sale of property, it is compulsory, referring to *Amesbury Woolen & Cotton Mfg. Co. v. Inhabitants of Amesbury*, 17 Mass., 461; and the court adds: "The obvious reason of the rule, though not prominently set forth in that case, is clearly stated in the opinion of the court in the case of *Preston v. City of Boston*, 12 Pick., 7. It arises from the power and authority placed in the hands of a collector of taxes, by virtue of his warrant, to levy directly upon the property or person of every individual whose name is borne on the tax list, in default of payment of the taxes. To use the language of the court in the case just referred to, 'Such warrant is in the nature of an execution running against the property and person of the party, upon which he has no day in court, no opportunity to plead and offer proof, and have a judicial decision of the question of his liability.'" I am not aware that this case in 4 Met., has been overruled or questioned in Massachusetts. The late cases, as already said, refer to it as an authority as though they also came within the principles there laid down. And so long as it stands, there certainly is no reason for saying that the authorities in that state sustain plaintiff's view in this case. They stand directly the other way, and fully sustain us in the views we have already stated, and such we think is the clear weight of authority.

In this case the city claimed the money under color of right. The assessment was illegal, and the city had no means of enforcing payment, or of seizing the person or property of the plaintiff, or of selling his property and giving any one a colorable title thereto. Knowing all these facts, the plaintiff voluntarily paid the money, and cannot now recover it back.

The judgment must be reversed, and a judgment entered upon the special verdict in favor of the city, plaintiff in error to recover costs in both courts.

The other Justices concurred.

MURPHY V. WALTERS.

Chauncey Murphy v. William Walters.

Criminal complaints: False imprisonment. One who in making a criminal complaint merely states the facts and circumstances to the prosecuting attorney and swears to the complaint drawn by the latter embodying such facts, is not liable in an action for false imprisonment, though the facts sworn to fail to make out a criminal offense.

Criminal proceedings: Public matters: Private interference: Presumptions. All criminal proceedings being on behalf of the people, there is no legal presumption of any personal interference by private persons beyond what is made to appear.

Criminal complaints: Statement of facts: False imprisonment. In criminal proceedings one who simply lays facts before a magistrate and leaves all determination to the unbiased and unsolicited conduct of that officer, is not liable in trespass for false imprisonment unless he takes some part in furthering the arrest or urging the detention of the accused.

Heard April 20. Decided June 6.

Error to Ingham Circuit.

Dart & Shields, for plaintiff in error.

Edward Cahill, for defendant in error.

CAMPBELL, J:

Walters sued Murphy for a wrongful arrest on void process, and obtained a judgment below, which is removed into this court by writ of error. The errors assigned arise upon the rulings on trial.

Murphy complained before a magistrate that Walters had procured one Snyder to vote for a moderator at a school district meeting, the latter not being a voter and Walters knowing that fact. Upon Murphy's affidavit and complaint a criminal warrant issued setting forth the same form of charge contained in the complaint, on which Walters was arrested, examined, and finally discharged. The declaration included counts for malicious prosecution and false imprisonment, but the case went to the jury on the theory of false imprisonment.

MURPHY v. WALTERS.

There was evidence in the case which the jury were at liberty to believe, that Murphy expressed to the person representing the prosecuting attorney that he did not wish to commence any complaint unless Walters was liable, and that upon being advised of such liability he signed the complaint drawn up by that person and swore to it before the justice, with whom it was left until, some weeks afterwards, the warrant was issued and Walters was arrested without any further intervention by Murphy except as a witness.

The only important question in the cause arises upon the refusal of the circuit judge to charge as requested by the plaintiff in error, that if the warrant was void and the arrest illegal, still if the jury should find "that the defendant merely stated the facts and circumstances of which he complained to George G. Lapham, an attorney at law and acting prosecuting attorney for this county, and that such statement was reduced to writing by said attorney and sworn to by said defendant Murphy, and that on such complaint, and at the request of said attorney (Lapham) the warrant was made by the justice, the defendant is not liable in this action for false imprisonment."

This request assumes that Lapham, in what he did, was looked upon by Murphy as in no sense his attorney, but as representing the public prosecutor, and that whatever Murphy did was in subordination to his advice and guidance, and submitted to the justice for his official action without any urgency or request of Murphy as to any future proceedings except such as the magistrate should approve.

As all criminal proceedings are on behalf of the people, there is no legal presumption of any personal interference by private persons beyond what is made to appear from the record or otherwise. In private actions the proceedings are usually chargeable to the parties and their agents. The same principle would indicate that public proceedings are referable to the public agents who intervene, and not to those who are passive witnesses and not moving parties.

It seems to be considered that in criminal proceedings a

MURPHY v. WALTERS.

person who simply lays facts before a magistrate, and leaves all further action to the unbiased and unsolicited conduct of the latter is not liable in trespass for false imprisonment, unless he takes some part in furthering the arrest, or urging the detention. The distinctions are pointed out in *Lock v. Ashton*, 12 Q. B., 871, where a person who was held liable for a preliminary arrest without process, was held not liable for a remand made by the magistrate on his own judgment.—See also *Hopkins v. Crowe*, 7 C. & P., 373; *Brown v. Chapman*, 6 M. G. & S., 365; *West v. Smallwood*, 3 M. & W., 418; *Barber v. Rollinson*, 1 Cr. & M., 330. The distinction between active interference and mere submission to the judgment of courts and officers is somewhat discussed in *Green v. Elgie*, 5 Q. B., 99, and *Carratt v. Morley*, 1 Q. B., 18; *Austin v. Dowling*, L. R., 5 C. P., 534.

The charge which was requested and refused, excluded the idea of any personal intervention by Murphy as in any sense an active mover or party, and assumed all that was done to have been really done by Lapham or the magistrate. Murphy's liability on that theory could not be maintained for false imprisonment, but only for malicious prosecution, in case malice existed.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

STEWART v. ASHLEY.

William Stewart and others v. George Bailey Ashley.

Ejectment: Joint plaintiffs: Undivided interests: Severance: Anomalous proceedings: Objector equally at fault. Where in an action of ejectment brought by two plaintiffs jointly, each claiming an undivided interest, after a trial and judgment in favor of one plaintiff and against the other, the cause had been treated as practically severed into two distinct suits, which were proceeded in separately, though without any order of severance or change of pleadings, one branch being taken by defendants to the supreme court for review and there affirmed, and afterwards a new trial under the statute procured and a trial and verdict had and judgment rendered and satisfied, an objection interposed by the defendants when the other branch was moved by the plaintiff who on the first trial had been defeated, that there was no proper case before the court for trial, is not sustained where both parties have united in treating the action as divided, and are alike responsible for the anomalous character the proceedings have assumed.

Ejectment: Guardian and ward: Guardian's sale: Limitations: Burden of proof. In an action of ejectment brought by one who had been under guardianship as a minor to test the validity of a sale by his guardian, the burden of proof upon the question whether the suit was brought within the prescribed time after the majority of the ward for bringing such suit, is upon the plaintiff.

Burden of proof: Affirmative. Whenever between parties who are contending in any legal proceeding a particular issue is raised, either by formal pleadings or the regular prosecution of the controversy in matter of fact, he who in substance and effect, whatever the mere form, has the affirmative of that issue, and is in such position that if what is alleged on his side is not maintained his case will consequently fail, must certainly be bound to find evidence to support it, and of course a preponderance, if there be evidence on both sides.

Burden of proof: Affirmative: Continuance of infancy. In general the burden of proof lies upon the party who seeks to support his case by a particular fact of which he is supposed to be cognizant; and one of the examples given is, that one who insists upon the continuance of infancy to defeat a new promise proved upon him at a given time, must prove that his nonage was still continuing at that time.

Heard April 20. Decided June 6.

Error to St. Clair Circuit.

B. C. Farrand, W. T. Mitchell and C. R. Brown, for plaintiffs in error.

A. E. Chadwick and Hoyt Post, for defendant in error.

GRAVES, J:

This is an action of ejectment, originally commenced by

STEWART v. ASHLEY.

George Bailey Ashley and Charles A. Bailey as joint plaintiffs, to recover of plaintiffs in error the fee of the entire premises described in the declaration; and in the course of the proceedings, which have been extremely loose, the case from one stage of it seems to have been treated as practically severed into two; one in favor of Ashley and the other in favor of Bailey, and each being prosecuted on the original joint declaration and joint plea thereto, and without any specific order for a division of the action or any change of pleading. The issue of record as first formed appears to have been perpetuated in the files and papers, except as a change be claimed to have been caused or recognized by an alteration in the mode of entitling proceedings and by the force and effect of the first judgment, which was in favor of one of the joint plaintiffs below, and against the other. The first trial was before the court without a jury, and at that stage the two plaintiffs below proceeded jointly and the court found against Ashley, but in favor of Bailey, for an undivided half of the premises claimed jointly and in entirety, and on this finding judgment was entered. As a consequence of this, it seems to have been taken for granted by court and counsel at this time that a complete and radical division of the action on the part of the plaintiffs had occurred, and that thereafter the case was to be considered as *ipso facto* divided into two, without any further entry or order on that subject, and without any amendment of the declaration, so that nothing more was required in pursuing the litigation than to treat Ashley as one distinct plaintiff and Bailey as another, and each prosecuting on the original joint declaration. Hence at this point we find distinct entries commenced: one set being entitled with Bailey as sole plaintiff and the other with Ashley as sole plaintiff, and the first is an order by consent entitled as in case of an action by Bailey alone, and which purports to set aside "the judgment rendered in this cause" and to allow the defendants a new trial, and also to give leave to defendants to file a claim for enhanced value for improvements, and "the plaintiff" to have an assess-

STEWART V. ASHLEY.

ment of the value of the premises without improvements. Next following this entry is a verdict entitled in the same way, in which the jury find for "the plaintiff an undivided one-half of the premises and assess the improvements at two thousand two hundred and fifty dollars, and the value of "the premises" as they would have been without the improvements and without waste, at the same sum, viz.: two thousand two hundred and fifty dollars.

The Bailey branch of the case here runs out. The record shows nothing further as to him. No judgment appears to have been entered on this verdict, and no claims for estimates appear.

The only evidence in the record in regard to them is contained in the recitals noticed.

The departure in the record of the Ashley branch from the stem is marked by an order which is entitled "George Bailey Ashley v. William Stewart, Peter B. Sanborn and Ezra C. Carleton," and then proceeded as follows: "In this cause, on motion of A. E. Chadwick of counsel for plaintiff, after hearing William T. Mitchell, Esq., in behalf of defendants, ordered by the court now here that the plaintiff be granted a new trial on the payment of costs." This is followed by an order having the same title, and which, after reciting that "the plaintiff" had paid the costs, ended by ordering "that a new trial be granted to him, according to the statute in such case made and provided." The succeeding entries are entitled in the same way, and the first is the empaneling a jury "in this cause," and is followed by a verdict in favor of Ashley for an undivided half of the premises and a finding embodied in it that the value of the premises had been increased by improvements made by Stewart two thousand eight hundred dollars, and that the premises without such improvements, and if no waste had been committed, would have been worth two thousand two hundred dollars. The verdict also recites that Stewart filed a claim in writing for compensation for improvements, and that Ashley filed a request in writing for an esti-

STEWART v. ASHLEY.

mato of the value the premises would have borne in case there had been no improvements or waste committed. The record affords no other evidence of the filing of these requests for estimates and valuation. The next entry is the judgment on the verdict, which is entitled with Ashley as sole plaintiff, and it recites that "the plaintiff" had filed in writing his election to abandon the premises to the defendants at the sum estimated by the jury and to take judgment for such value, and recovery is thereupon awarded of that sum. This recital is the only evidence of an election to take such judgment. It is not worth while to comment at length on the amazing character of this practice. Surely the titles to real property and the rights of parties are too important to be put in peril by such gross inattention to legal formalities and the common requirements of ordinary judicial methods. It may be that no vital mischief has been caused in this particular litigation by the very objectionable looseness and carelessness which seem to have marked the conduct of it. But if so, the escape is accidental and confers upon those who may be responsible no immunity from criticism. So far as practicable there should be amendments to bring the record into some shape which may enable interested parties in the future to find out from it and without needless difficulty its legal bearing and force in relation to the title to the premises in controversy.

At the trial of this Ashley branch of the original action before the jury the defendants below took several objections, and a bill of exceptions was settled which is brought up by the writ of error. After the jurors were sworn the plaintiffs in error insisted that there was no proper case before the court for trial, inasmuch as there had been no order for any separate prosecution by Ashley and no amendment of pleading to present a distinct case of Ashley against the plaintiffs in error. The point was overruled and an exception was taken.

Conceding, but not deciding, that the point was one proper to be raised by an objection and an exception in

STEWART v. ASHLEY.

this way, the plaintiffs in error were perhaps hardly in a situation to take it. In the order by consent, and which was the first one made after the finding by the court and judgment in favor of Bailey and against Ashley, both parties united in treating the action as divided, and from that time until the swearing of this jury they respectively proceeded, as would seem from the light furnished by the record, upon the theory that the action had come in fact and in law to be severed into two, with one declaration and one plea, and those the pleadings originally made. No other construction can be put upon their practice, and whatever informality and impropriety were involved in it, both seem to have been in some measure responsible for it. The Ashley branch now intended to be brought before us seems to have been tried upon the merits and upon an idea that the parties named therein were at issue upon a proper declaration and plea, and that there were also before the court the necessary claim and counter claim for valuations, and in view of all the circumstances, and considering that the case must go back upon another ground, we do not perceive any necessity for passing definitely upon the question thus caused to spring out of the unusual predicaments described. But before leaving this review of the record we may mention the difficulty there must have been as the litigation was shaped in setting before the court and jury a true representation of the precise legal claims on each side in the form of an issue roll, if indeed any attempt was made to comply with the useful rule on that subject.

The plaintiffs in error claimed title through a conveyance upon a sale made by the guardian of defendant in error, and the action by the defendant in error was prosecuted to overthrow the title asserted under that conveyance. It was commenced on the first day of January, 1873, as stated in the charge of the court, and in view of our statute regulating the time within which such an action must be brought, § 4621 *C. L.*, it became a material, if not a controlling, question for the jury on the evidence whether it

STEWART V. ASHLEY.

was brought within the prescribed period, namely: five years next after Ashley attained the age of twenty-one years, and this depended upon the true time of his birth. He claimed that he was born in September, 1847, and if this were so then the suit was begun in season. The plaintiffs in error claimed, however, that the date of his birth was in 1846, and hence that the action was not maintainable on account of the lapse of more than five years between its institution and his attaining majority. There was considerable evidence bearing on the question, but it was conflicting. Some of it favored one claim and some of it the other. The circuit judge refused to charge that Ashley was bound to show by a preponderance of evidence that his action was brought within the allotted period. On the contrary he instructed the jury that it was for the defense to make out to their satisfaction that more than five years had run between Ashley's majority and the commencement of the action; or, in other words, that his suit was not brought seasonably, and the judge added that all mere presumptions were in his favor.

We think in this the court erred. In bringing and pursuing this action Ashley simply assailed and brought into question the validity of the sale and title made by his guardian, and his right to contest in such form his guardian's conveyance, being governed by the statute, depended upon his having begun his action within the time allotted therefor by the statute. The seasonableness of his commencement of suit was an essential condition of his right to claim recovery of the land against his guardian's sale. It was part of his own case and not separate and independent matter of defense. Whenever between parties who are contending in any legal proceeding a particular issue is raised, either by formal pleadings or the regular prosecution of the controversy in matter of fact, he who in substance and effect, whatever the mere form, has the affirmative of that issue and is in such position that if what is alleged on his side is not maintained his case will consequently fail, must certainly

STEWART V. ASHLEY.

be bound to find evidence to support it, and of course a preponderance if there be evidence on both sides.

His mere claim of the existence of a disputable fact cannot stand in place of evidence of it and operate as proof. And if the evidence adduced in its favor is not sufficient to outweigh the contrary evidence the fact must stand as unproved and he whose case depends on it must fail. This general rule, that the party must find proof of every essential fact alleged by him, is often strengthened and emphasized by convenience and policy. He who alleges a specific fact may generally be presumed to know more about it and to have better means of proof than he who denies it; and usually it is far easier for the first to prove what he affirms than for the other to prove his denial. Consequently it has been laid down pretty strongly that in general "the burden of proof lies upon the party who seeks to support his case by a particular fact of which he is supposed to be cognizant," and one of the examples is, that one who insists upon the continuance of his state of infancy to defeat a new promise proved upon him at a given time, must prove that his nonage was still continuing at that time.—*Borthwick v. Carruthers*, 1 T. R., 648. A brief explanation of the present case according to its natural unfolding down to the beginning of the actual conflict would seem to render the point quite clear. Ashley in the first place shows title in his ancestor, the death of the latter, the heirship and the circumstance of adverse holding by plaintiffs in error. The latter thereupon show the title through Ashley's guardian; and if the case stops here, Ashley must be defeated, because the title from his guardian must prevail against him in the absence of proof of the existence of the condition which is indispensable to his right to attach that title.

The essential contest, then, begins here. He is compelled to virtually allege and prove the existence of the prescribed condition; or, in other words, the fact of infancy and its duration, and certainly it is incumbent on him to maintain this claim by a preponderance of evidence, and not upon the plaintiffs in error to establish the negative proposition,

STEWART V. ASHLEY.

namely: that his infancy did not so continue. In case the evidence is balanced on this final issue, Ashley's claim against his guardian's sale is not sustained. It is not made apparent that he is in a position to question it.

We also think the observation of the judge in the same connection that all mere presumptions were in Ashley's favor was too wide and general, but we have not sufficient particulars before us to judge of the entire extent to which it is likely the jury applied it.

There are some other questions, but as it is rather probable than otherwise that they will not arise on another trial, or at least that they will not so arise as to be subject to the same considerations, it is not expedient to discuss them.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

**Frederick Bush and another v. Edward H. Davis;
and Edward H. Davis v. Frederick
Bush and another.**

Arbitration: Awards: Construction: Definiteness: Presumptions. Awards of arbitrators are to be liberally construed, and require only such degree of definiteness as is sufficient to uphold a contract; and all presumptions are to be made in favor of their validity.

Awards: Amount: Time: Matter of computation. An award will not be deemed void on the ground of failure to find the amount due at its date, where all the elements are found and set forth so that it is a matter of the simplest computation to determine the exact amount.

Awards: Interest: Submission: Intendments. An award will not be disturbed for allowing interest at ten per cent. unless the record discloses that the allowance of such interest was beyond the scope of the submission; every reasonable intendment must be indulged in support of the award, and it is to be presumed to be within the submission unless the contrary expressly appears.

Submitted on briefs April 20. Decided June 6.

Error to Kalamazoo Circuit.

BUSH v. DAVIS.

Severens, Boudeman & Turner, for Bush & Patterson, to the point that in an action at law upon an award nothing *dehors* the award itself can be shown as a defense, not even fraud or corruption of the arbitrators, cited: *Elmender v. Harris*, 5 Wend., 516; *Efner v. Shaw*, 2 Wend., 567; *Fidler v. Cooper*, 19 Wend., 285; *Shoeron v. Wood*, 5 Hals., 7; *Owen v. Boerum*, 23 Barb., 187; *Shepard v. Briggs*, 28 Vt., 81; *Mitchel v. Bush*, 7 Cow., 185; *Harris v. Social M. Co.*, 8 R. I., 133; *Barlow v. Todd*, 3 Johns., 366; *De Long v. Stanton*, 9 Johns., 38; *Morse on Arb.*, 336-7; that if the submission be *in pais*, neither corruption, partiality, misbehavior, or mistake can be shown as a defense to an action upon the award, but the only remedy is by bill in equity to set it aside or correct it, unless the submission be by order of court in a pending suit, in which case application may be made to the court to correct it: *Morse on Arb.*, 331-2; *Elkins v. Page*, 45 N. H., 310; *Fletcher v. Hubbard*, 43 N. H., 58; *Hough v. Beard*, 8 Blackf., 158; that arbitrators are the judges of both law and fact, and that even courts of equity will interfere to correct mistakes only in extreme cases, and the most that can be said in this case is, that the arbitrators have made a mistake as to the *rate* of interest, and this is no defense to an action at law upon the award: *Morse on Arb.*, 214; *Brown v. Clay*, 31 Me., 518; *Whitmore v. La Ballisten*, 35 Me., 488; *Seviller v. Kinney*, 32 Me., 464; *Tyler v. Dyer*, 13 Me., 41; *Hull v. Decker*, 51 Me., 31; *Hazleton v. Smith.*, 3 Vt., 535; *Downer v. Downer*, 11 Vt., 395; *Ind. Cent. R. R. Co. v. Bradley*, 7 Ind., 49; *Walker v. Sandben*, 8 Greenl., 288; *Johnson v. Noble*, 13 N. H., 286; *W. M. R. R. Co. v. Bean*, 39 N. H., 107; *B. W. Co. v. Gray*, 6 Mich., 131; *Randell v. Le Fleur*, 6 Allen, 80; *Bigelow v. Newell*, 10 Pick., 348; *Argus v. Pitford*, 11 M. & W., 60; *Moore v. Burnett*, 17 Ind., 349; *Merritt v. Merritt*, 11 Ill., 565; that arbitrators have

BUSH v. DAVIS.

a perfect right to order the payment of a certain sum with interest from a certain date: *Morse on Arb.*, 185-6, 394, 422; *Skeels v. Chickering*, 7 Met., 316; *McKinsly v. Solomans*, 2 Johns., 57; *Emery v. Hitchcock*, 12 Wend., 156; *Russell on Arb.* (3d ed.), 240; and to disregard the strict rules of law and decide what in their judgment is right, just and conscientious in the case: *Morse on Arb.*, 217; *Greenough v. Rolfe*, 4 N. H., 357; *Johnson v. Noble*, 13 N. H., 286; see also *W. J. R. R. Co. v. Thomas*, 21 N. J. Eq., 205; *Hazleton v. Smith*, 3 Vt., 535; *Stevens v. Parson*, 5 Vt., 503; *Jocelyn v. Donnell*, Peck (Tenn.), 274; *Bliss v. Rollins*, 6 Vt., 529; and to allow interest to the same extent as parties themselves might contract to pay: *Higgins v. Willis*, 3 M. & R., 382; *Hopcraft v. Hickman*, 2 Sim. & St., 130; *Martin v. Mather*, 2 Ves. Jr., 15; 1 *Stephen's Nisi Prius*, 161; *Waring v. Cremcliff*, 2 Ves. Jr., 99; *In re Badger*, 2 B. & Ald., 703; *Edwards v. G. W. R. R. Co.*, 11 C. B., 648; *Hayes v. Miller*, 12 Ind., 187.

May, Buck & Powers, for Davis, that a court will set aside an award on account of a mistake in point of law by the arbitrators apparent on the face of the award or disclosed by some other authentic instrument: *Watson on Arb.*, 278; *Willard's Eq. Jur.*, 77; that an award must stand or fall by its own intrinsic correctness, tested by legal principles: *Kline v. Katara*, 2 Gallison, 61; *Chance v. Westman*, 13 East, 357; *Williams v. Craig*, 1 Dallas, 119; *Kyd on Awards*, 251; *Terrance v. Amsden*, 3 McLean, 509; *Muldron v. Norris*, 2 Cal., 74; *Caldwell on Arb.*, 121 et seq.; and is analogous to a judgment or the verdict of a jury: *Bovier's Law Dic.*; *Watson on Arb.*, 284; that this award does not follow the submission, in that it does not find the balance now due, but merely one that was due in October, 1869; and that it is clearly defective and outside the submission in its

BUSH v. DAVIS.

allowance of interest, this being an independent question not submitted to the arbitrators nor brought before them by the parties: *Butler v. Mayor, etc.*, 7 Hill, 330; 15 N. H., 535; *Matter of Williams*, 4 Denio, 194; 5 *Littell*, 32; that no interest being allowable above seven per cent., except by agreement of the parties (*Comp. L. 1871*, § 1632), the finding of interest at ten per cent. is fatal; that this clause of the award is not separable or divisible, but must stand or fall together, and cannot be construed into a finding of lawful interest and so sustained: *Whitaker v. Whitaker*, 49 N. H., 176; *Harris v. Manf. Co.*, 9 R. I., 99; 11 Am., 224; *Caldwell on Arb.*, 121; *Watson on Arb.*, 241.

GRAVES, J:

These parties agreed to arbitrate and mutually gave bonds on the 28th of January, 1874, to observe and perform the expected award.

The transactions submitted must be gathered from the recitals and conditions of these bonds. They are not otherwise described, and since both of these instruments set out the same matter by way of recital and conditions, so far as they serve to explain what was agreed to be submitted, it is not material for our present purpose which bond is quoted from.

The recital and condition in the bond made by Davis read as follows: "Whereas a suit has been in litigation between the bounden E. H. Davis and said Bush & Patterson, in which suit it has been claimed by said Bush & Patterson that a certain amount, being a balance of account, was due them from the above bounden E. H. Davis on a contract according to plans and specifications and for extra material and labor furnished on the construction of the International hotel building, so called, in said village of Kalamazoo. Now, therefore, the condition of this obligation is such that if the said bounden E. H. Davis shall abide

BUSH v. DAVIS.

by, perform and keep the award of Elijah O. Humphrey, David B. Merrill and Thomas S. Cobb, arbitrators mutually chosen and agreed upon to award and determine concerning the matters in dispute, including the adjustment of all unsettled costs resulting from suit or suits heretofore had between the said Davis and the said Bush & Patterson, then this obligation shall be void. It being understood that the matters in dispute shall be stated to said arbitrators by said Davis and said Bush & Patterson personally, under oath, upon receiving notice from said arbitrators, and without counsel; and it is further agreed that the evidence, or any part thereof, as taken in a suit between the parties in the circuit court of Kalamazoo county in 1872, may be submitted by either or both of said parties to said arbitrators, who shall decide on the points in controversy between the parties, and shall make their award in writing to said Davis and said Bush & Patterson, on or before the 10th day of February, A. D. 1874."

The arbitrators proceeded to a hearing on the basis of the submission here described, and on the 9th of February made and published their award.

Davis refused to perform it, and Bush & Patterson sued him to recover the amount awarded.

The action was tried before the court without a jury on a statement of facts set forth in a stipulation, and a recovery was allowed for the sum awarded, excepting, however, certain interest, which the court regarded as unwarranted and refused to include. Both parties excepted, and both have brought error. The arbitrators found by their award that there was due from Davis to Bush & Patterson the sum of four thousand one hundred and sixty-seven dollars and fifty-three cents on the 15th day of October, 1869, and awarded payment of it on or before March 1, 1874, with interest at the rate of ten per cent. per annum from the 15th of October, 1869, until payment. The stipulation which set out the facts for the court below, among other things, stated "that nothing was said by either of the parties before the

BUSH v. DAVIS.

arbitrators touching the rate of interest proper to be computed upon any claim in favor of the parties, and nothing was said or agreed by either party to extend the scope of the submission;" and it stated in conclusion, "that it is intended by this stipulation to submit to the court the question whether the award of said arbitrators was within the authority of said arbitration bonds and submission, and a final and certain award upon the questions submitted to them, and such judgment is to be entered hereon as the law requires upon the foregoing facts."

On the part of Davis it is urged that the arbitrators were required to find what was the balance due at the date of the award, and that the finding was defective and uncertain in this respect, inasmuch as it determined the amount due in October, 1869, and not at the time when the award was made. It is also maintained on his part, that in awarding interest the arbitrators exceeded their powers, and that the whole award is therefore bad. For Bush and Patterson it is insisted that these positions are respectively untenable, and not only so, but on the contrary, that the award was entirely good for the sum specified and the interest at ten per cent. These opposing views explain the objections on each side to the judgment of the circuit court.

As previously noticed, that court adopted a middle course and held the award good for the four thousand one hundred and sixty-seven dollars and fifty-three cents and the back interest at seven per cent., and bad for the additional back interest of three per cent.

The submission barely described the subjects to be arbitrated, by reference to them in general terms, and without setting forth their contents or provisions, and for certainty and distinctness it depended chiefly upon the showing and explanations to be made by the very matters to be acted on.

For example, the submission referred in the most general manner to a claim upon a named contract, but gave no information in regard to the shape and stipulations of that contract. The submission went far enough to identify the

BUSH v. DAVIS.

contract, but not far enough to show its provisions. When the arbitrators proceeded to act under the submission, they were enlightened on this subject by the very matters to be acted on. What was contemplated as needful to particularize the submission and fix and distinguish the line of judgment and its limits, was placed in their hands. The contract itself, and all other matters reached and embraced by the agreement to arbitrate, were before them. Such was not the case in the circuit court, and it is not the case here. That court had to deal with the submission and award without aid from the transactions which were laid before the arbitrators, and this court in proceeding to review the judgment of the circuit court is in no better position. The case must depend upon the submission and award, and the award must be examined as a whole, and fairly construed according to the principles which now govern arbitration findings.

No critical discussion is necessary. An application of settled rules is enough to show that the first ground of objection raised by Davis has no force.

Granting, but not deciding one way or the other, that it was essential the finding should show the amount due at the date of the award, and still there is no serious difficulty. The elements are all found and set forth to enable any body to ascertain by the simplest calculation the exact amount due at the date of the award and without departing in the least from its scheme or principle. All that is required at the present day in such cases is certainty to a common intent, and that exists here. If an award is sufficiently definite to be obligatory as a contract it is sufficiently so as an award.—*Clement v. Comstock*, 2 Mich., 359; *Purdy v. Delavan*, 1 Caines R., 304; *Akely v. Akely*, 16 Vl., 450; *Perkins v. Giles*, 50 N. Y., 228. It is wisely settled that the mode of deciding disputes by judges chosen by the parties themselves for the very occasions, calls for every encouragement from the ordinary tribunals, and hence that formal matters and professional niceties are not to be regarded, and whenever by fair intendment the proceeding can be upheld it will be.

BUSH v. DAVIS.

Authorities might be multiplied almost indefinitely to illustrate this doctrine and show the unsoundness of the first ground of objection to the award, but besides those already cited, it is sufficient to mention the following: *Boston Water Power Co. v. Gray*, 6 Met., 131; *Skeels v. Chickering*, 7 Met., 316; *Mikles v. Thayer*, 14 Allen, 114; *Jones v. Carter*, 8 Allen, 431; *Sears v. Vincent*, 1b., 507; *Sperry v. Ricker*, 4 Allen, 17; *Caldwell v. Dickinson*, 13 Gray, 365; *Strong v. Strong*, 9 Cush., 560; *Tallmann v. Tallmann*, 5 Cush., 325; *Pike v. Gage*, 9 Foster, 461; *Parsons v. Aldrich*, 6 N. H., 264; *Burchell v. Marsh*, 17 How., 344; *Humphreys v. Pearce*, 14 E. L. & E., 495; *Law v. Blackburn*, 24 E. L. & E., 312; *Crawshaw v. York, etc., Railway Co.*, 11 E. L. & E., 397; *Dickerson v. Tyner*, 4 Blackf., 253; 2 Cow. & H. Notes, 1027.

The court committed no error in overruling the first proposition against the award.

In disposing of the second point, the first consideration is, whether it appears that in awarding interest at ten per cent. the arbitrators went beyond their power, because if it does not so appear, then Bush & Patterson were entitled to judgment for the amount the arbitrators determined to be their due, and the court below erred in cutting down the interest from ten to seven per cent. Now we cannot discover any plausible ground for the course of the circuit court in deciding that Bush & Patterson on the basis of the award were entitled to back interest at seven per cent. and were not entitled to it at ten per cent. as found. No such distinction can be founded on the wording of the submission or award. As presented in the court below, and as presented here, the point rests not upon any actual knowledge of the contents of the contract and other matters which measured the power of the arbitrators under the general submission in regard to the allowance of interest, but upon presumption and intendment under the established doctrine concerning arbitrations. This doctrine has been noticed already as to some of its applications. It may be mentioned

BUSH v. DAVIS.

now in a somewhat different aspect. Mr. Best says: "It is a rule never to raise a presumption for the sake of overturning an award, but on the contrary to make every reasonable intendment in its support."—*p. 473, Wood's Ed.* And following this general proposition it is laid down distinctly, that the award shall be presumed within the submission unless the contrary expressly appears.—*Joy v. Simpson, 2 N. H., 179; Solomons v. McKinstry, 13 J. R., 27; 2 Cow. and H. notes, 1027.* And see also *Ingram v. Milnes, 8 East, 445; Rixford v. Nye, 20 Vt., 132; Mulder v. Cravat, 2 Bay, 370; Jackson v. Ambler, 14 J. R., 96; Spear v. Hooper, 22 Pick., 144; Gonsales v. Deavens, 2 Yeates, 539; Ross v. Watt, 16 Ill., 99; Maryland, etc., v. Porter, 19 Md., 458; Archer v. Williamson, 2 Har. & Gill, 62; Skillings v. Coolidge, 14 Mass., 43; Coxe v. Lundy, 1 N. J. L. (Coxe), 255; Kleine v. Catara, 2 Gall., 61; Schultz v. Halsey, 3, Sandf. Supr. C. R., 405; Lowndes v. Campbell, 1 Hall, 598; Stipp v. Washington Hall Co., 5 Blackf., 473, and the cases previously cited, and particularly *Clement v. Comstock.**

As before stated, the submission embraced a given contract but did not specify its terms or scope, and that contract may or may not have warranted the interest awarded, but whether it did so or did not do so, is a fact which was made obvious to the arbitrators, and yet could not be known to the court below and cannot be known here. If the contract justified the allowance of the interest, then certainly its allowance was within the submission, since that contract was referred to the arbitrators and the submission contained nothing to prohibit the award of any interest proper under that contract. Suppose the submission had referred a promissory note by name simply and without any explanation of its terms, no one would maintain, on consideration of the submission alone, and without any legitimate knowledge concerning the contents of the note, that the allowance of interest upon it, or the allowance of interest at the rate of ten per cent.,

BUSH v. DAVIS.

must have been *ultra vires* the submission. The same principle applies here.

The established doctrine in such cases would require the court to intend in favor of the submission, and it was the duty of the court below, as it is the duty of this court, to presume that the contents of the matters submitted, and which were known to the arbitrators, but were not made known to the court below, and are not made known to this court, were such as to warrant the allowance of interest precisely as they allowed it. The conclusion is, that in view of this record Bush & Patterson appear to have been entitled to the back interest as awarded, and that the circuit court erred in cutting it down.

The judgment should be reversed, and as all the facts are conclusively ascertained, a judgment should be entered for the correct sum. No new trial is necessary or would be proper. Both writs of error having been submitted on one record, and one brief on each side, Bush & Patterson will recover costs in this court as for one hearing.

The other Justices concurred.

Thomas Parker and another v. Andrew J. Grinnell.

Services: Agency: Evidence: Cross-examination. In an action for services in purchasing and shipping sheep for defendants, it is error on cross-examination of a witness who has given evidence tending to show the purchase from witness by plaintiff of certain specified sheep for defendants, to exclude the inquiry as to who paid him for such sheep; the payment in completion of the bargain might direct the jury to the principal for whom the purchase was made with quite as much certainty as any testimony of witnesses as to their mere understanding; the inquiry is relevant and important.

Submitted on briefs April 50. Decided June 8.

Error to Calhoun Circuit.

PARKER V. GRINNELL.

T. G. Pray, for plaintiffs in error.

F. A. Stace and *James H. Campbell*, for defendant in error.

COOLEY, CH. J:

Grinnell sued the plaintiffs in error for the value of his services in purchasing sheep for them and shipping them to Buffalo. The defendants denied ever employing him, and denied any joint interest in the purchase of sheep. Their case was, that the defendant Parker was purchasing sheep through one Bullard as his agent, and that whatever had been done by the plaintiff had been done for Bullard, and without the authority of Parker.

Several exceptions were taken on the trial to the admission or rejection of evidence, only one of which seems worthy of notice. One Tombs, a witness for plaintiff, had given evidence tending to show that the plaintiff had purchased certain sheep known as "the Close and Tombs sheep" for the defendants. On cross-examination, to show that these sheep were actually purchased and paid for by another party, and not by or for the defendants, the witness was asked: "Who paid you for the sheep?" This was objected to and ruled out as irrelevant and immaterial.

To reach the conclusion that such evidence was irrelevant and immaterial, the court must have assumed that the fact of this purchase having been made for the defendants, was already established and indisputable. So long as that was a controverted fact, the payment, by whom made and in whose interest, could not be said to be irrelevant or unimportant. It was, on the contrary, one of the most important facts to be put, with all its circumstances, before the jury, and was calculated to throw quite as much light upon the point in dispute as the bargain itself. The bargain, on the plaintiff's showing, was made by an agent, probably without the mention of any principal; and it certainly cannot be assumed in advance that the payment in completion of the bargain would not direct the jury to the princi-

PARKER v. GRINNELL.

pal with quite as much certainty as any testimony of witnesses as to their understanding. But whether it would or would not, its relevancy to the issue was plain enough, and the question should have been allowed.

Many exceptions were taken to the charge of the judge. Such of them as are sufficiently certain and specific appear not to be well taken; the others will probably become immaterial on a new trial, which is now ordered, with costs of this court.

The other Justices concurred.

The People on the relation of The Michigan Paving Company v. The Common Council of Detroit.

Mandamus: Unliquidated demand. *Mandamus* does not lie to compel a city to pay an unliquidated demand, such as a claim on a *quantum meruit* for the value to the city of services performed and materials furnished on a contract which was afterwards forfeited.

Quantum meruit: Unperformed contract: Measure of damages. The amount saved by the city by letting a new contract to complete the work is not the test of the amount equitably due to the prior contractor for work done and materials furnished under a contract he failed to complete.

Submitted on briefs April 20. Decided June 6.

Application for *mandamus*.

Baker & Thompson, for relator, cited: *Whitely v. Lansing*, 27 Mich., 131; *Meech v. Buffalo*, 29 N. Y., 198; *Goodrich v. Detroit*, 12 Mich., 279; *Brevoort v. Detroit*, 24 Mich., 322; *Gas Co. v. San Francisco*, 9 Cal., 453; *Detroit v. Redfield*, 19 Mich., 376; *People v. Flagg*, 17 N. Y., 586; *Gas Co. v. New York*, 33 N. Y., 309; 1 *Dillon on Mun. Corp.*, §§ 383-8; *Peterson v. Mayor of N. Y.*, 17 N. Y., 449; *De Grave v. Mon-*

34 MICH.—26.

MICHIGAN PAVING CO. v. COMMON COUNCIL OF DETROIT.

mouth, 19 Eng. C. L., 300; *People v. Swift*, 31 Cal., 26; *Keyser v. School Dist.*, 35 N. H., 477; *Hoyt v. Thompson*, 19 N.Y., 207; *Abbott v. Herman*, 7 Greenl., 96; *Hayden v. Madison*, *Ib.*, 76; *Brady v. Mayor of N. Y.*, 20 N. Y., 312; *S. C.*, 2 Bosw., 173.

D. C. Holbrook, for respondents, cited: *State ex rel. Brackett v. County Judge, etc.*, 5 Ia., 380; *Putnam Co. v. Allen Co.*, 1 Ohio St., 322; *Burnett v. Auditor*, 12 Ohio, 54; *State v. County Auditor*, 19 Ohio, 322; *People v. Flagg*, 17 N. Y., 584; *People v. Judge of Probate*, 16 Mich., 204; *People v. Supervisors of Macomb Co.*, 3 Mich., 475; *Dillon on Mun. Corp.* (2d ed.), 760, note 1, 478, and cases cited; *Allen v. McKibben*, 5 Mich., 449.

COOLEY, CH. J:

The relator, it appears, entered into a contract with the city of Detroit to do certain paving at a stipulated price and within a stipulated time. A portion of the paving was done, and some labor performed and materials furnished for the remainder, when the common council, under a right reserved in the contract, declared it forfeited for failure in performance within the time agreed. For that portion of the paving which was completed the relator was paid, and a further sum of five hundred and sixty dollars was paid, which the council appear to have conceded that the relator ought to be allowed from the general fund of the city. The council also passed a resolution that the city engineer be directed to make an assessment "to pay the unliquidated claim." Nothing appears to have been done under this resolution, and a writ of *mandamus* is prayed to compel the common council "to make and levy said assessment, or that it may be commanded to allow and pay the balance" remaining due to the relator.

To show that there is a balance remaining due, the relator shows that the council subsequently relet the work to another

MICHIGAN PAVING CO. v. COMMON COUNCIL OF DETROIT.

party who was allowed to make use of the labor and materials of the relator which had not been paid for, and that what was paid to the second contractor for the completion of the work was less by some two thousand two hundred and twenty dollars than would have been payable to the relator had the first contract been completed. The conclusion is deduced that this sum is due the relator on a *quantum meruit*.

The conclusion is a somewhat violent one. Admitting that the city has had the benefit of some of the relator's labor and materials, it does not follow that it should pay therefor all that was saved by the second contract. The second contract is not shown to have been the same as the first, and we have no information concerning the circumstances under which it was made, except that it was to complete the paving for which the relator had contracted. Many circumstances might render it equitable that the relator should be charged for damages sustained by the city from the failure to complete the work as agreed, and the question of *quantum meruit* is not one which can be settled on an imperfect presentation like this. Neither is this the tribunal for the trial of such a question. This court may compel a municipal corporation to make provision for a liquidated demand, but *mandamus* does not lie to compel the payment of that which is unsettled, and in respect to which the respondent is entitled to a trial in the usual manner.

The writ must be denied, with costs.

The other Justices concurred.

CLAY v. PENNOYER CREEK IMPROVEMENT COMPANY.

David P. Clay v. The Pennoyer Creek Improvement Company.

Eminent domain: Improvement of navigable rivers: Appointment of commissioners: Final order: Certiorari. In proceedings under the statute to condemn lands for improving the navigation of rivers; the order appointing commissioners to determine the necessity of the taking and to ascertain the damages, etc., is not interlocutory merely, but is final so far as any action by the court is concerned, and may be reviewed on *certiorari*.

Improvement of navigable rivers: Statute construed: Private streams. The statute in question contemplates the improvement of navigable rivers, and not the creation thereof out of creeks and streams which in their natural state are in no sense navigable; and it is questionable whether it is applicable at all to streams strictly private, as such statutes are usually not to be enlarged by intendment.

Eminent domain: Petition: Jurisdiction. The petition in such proceedings is jurisdictional, and must set forth all the facts necessary to show that the petitioning corporation is authorized to make the proposed improvement, and has taken all the necessary preliminary steps.

Eminent domain: Improvement of navigable rivers: Petition: Dams: Consent of supervisors. Such a petition, averring that the stream is a navigable one and that the improvements contemplated include three dams, must allege the obtaining of authority from the board of supervisors to make the same, as they alone under the constitution (*Art. XVIII, § 4*) can authorize the bridging or damming of navigable streams; and the allegation of the procurement of the assent of the governor and attorney general and the approval of the board of control of the St. Mary's Falls Ship Canal, as required by the statute, does not suffice in this particular, but that requirement is an additional one.

Improvement of navigable rivers: Statute construed. There is a fatal defect in the statute under consideration, in that it makes no provision for the appointment of commissioners, and does not prescribe their duties, except by reference to certain sections of the plank road act, which are not broad enough to meet the requirements of this statute.

Legislation: Adopting by reference sections of another act: Construction. A statute thus adopting by reference parts of another statute must be construed precisely as if such adopted provisions had been embodied in it; and such a reference to a section of another statute cannot broaden or enlarge the scope of the language of such section beyond what it would import if literally reenacted in the new statute in the place it was designed to fill.

Heard April 20. Decided June 6.

Certiorari to Probate Court of Newaygo County.

Champlin & Fitzgerald, for plaintiff in *certiorari*.

Hughes, O'Brien & Smiley, for defendant in *certiorari*.

CLAY v. PENNOYER CREEK IMPROVEMENT COMPANY.

MARSTON, J:

Defendant in error is a corporation formed under "An act to authorize the formation of corporations for the purpose of improving the navigation of rivers," approved April 5th, 1869, being *chapter 85* of the *Comp. Laws*.

Upon the 10th day of January, 1876, a petition was filed on behalf of said corporation in the probate court of Newaygo county, praying the court to appoint three commissioners to ascertain and determine whether it was necessary to the public interests to take certain lands therein described, owned by David P. Clay, for the purpose proposed in said petition, and if so, to ascertain and determine the amount of damages therefor.

The petition set forth the organization of the corporation, and that it was formed for the purpose of improving Pennoyer Creek; that the corporation had obtained the consent in writing of the governor and attorney general to the proposed improvement; that the necessary maps and plans had been submitted to and approved by the board of control of St. Mary's Falls Ship Canal; that in pursuance of their organization they had constructed three dams across said creek, and had at great expense cleared the stream of certain obstructions, also where necessary the bed had been deepened and straightened; that the stream is, and was before such improvements were made, a navigable stream, but that the practical navigation thereof was obstructed, which rendered it necessary to utilize and control the water in a lake at the head or source of the stream; that there were large quantities of pine along and around said stream and lakes which could be most economically got to market in no other way, and that the improvements made and contemplated would benefit the entire stream and the navigation thereof; that the improvements proposed would affect certain therein described lands, the property of said Clay, in that the water in said stream would be raised and backed up, and the use of said stream for water-power purposes be

CLAY V. PENNOYER CREEK IMPROVEMENT COMPANY.

lost to the owner of said lands, which would at times be flooded, and that an easement therein or in a portion thereof was and would be necessary for the public use. The petition also alleged that they had attempted to agree with Clay upon the amount of compensation, but could not. Upon filing this petition, the 7th day of February, 1876, was fixed for the hearing thereof, and notice given by publication. At the time fixed, Clay appeared and filed objections to the jurisdiction of the court, which were overruled. An answer was then filed, a hearing had and commissioners appointed, when the proceedings were removed to this court by *certiorari*.

An objection was taken on the argument, that the writ of *certiorari* was improvidently issued, the order of the probate court being merely interlocutory. We do not so consider it. The appointment of the commissioners by the court was one of the essential steps in the case, and was, so far as that court was concerned, final. The commissioners, after being appointed, proceed independent of the court in the performance of their duties, and after they have made the necessary examination and agreed upon a decision, they are to make and sign a report of their doings and file the same with the clerk of the court by which they were appointed, and which, without any action of the court whatever, is final and conclusive upon all persons who shall not, within fifteen days thereafter, make and file with the clerk a motion to set the same aside. The proceedings upon this motion cannot well reach the question of their appointment. We think a party is not bound to wait, although he may do so, until after the commissioners have acted and made a report which has been confirmed, before testing the jurisdiction and power of the court to appoint them, but may do so at once upon the appointment having been made.

A number of interesting and important questions were raised and discussed, but as there are fatal objections to be met with at the outset in this case, and as it would seem that additional legislation will be necessary in order to per-

CLAY v. PENNOYER CREEK IMPROVEMENT COMPANY.

fect the statute under which this corporation was organized, and the proposed improvement authorized, we do not consider it proper to discuss all of them at this time, as they will likely be considered and removed should the legislature undertake to remedy the defects pointed out.

The act under which this corporation was formed, and the proceedings in this case taken, seems to contemplate the improvement of navigable rivers, and not the creation of navigable rivers out of creeks or streams which could not in their natural condition be considered "navigable in any sense of the term. The title of the act is to authorize the formation of corporations for the improvement of navigable rivers." The first section authorizes persons to associate for the purpose of improving the navigation of any river in this state. Indeed, this question or idea of improvement of navigable rivers runs all through the act. Whether, therefore, it applies to streams strictly private, might become important, as the powers granted by such statutes are not usually to be enlarged by intendment. But this is a question we need not pass upon in the present case.

The petition is jurisdictional, and must set forth all the facts necessary to show that this corporation is authorized to make the proposed improvement, before it can ask for the appointment of commissioners to condemn lands for such purposes. It must show, or at least allege, the organization of a corporation; that it has obtained the approval and assent of the necessary officers and boards to make the proposed improvements; that certain lands are necessary in making such improvements; that they have attempted to treat with the owners of such lands and have been unable to agree, and therefore ask for the appointment of commissioners. And a failure to allege that they have taken all these necessary steps will be fatal, and will give the court no jurisdiction in the premises. The petition upon its face must show a substantial compliance with and adherence to the course prescribed by the constitution and statutes relat-

CLAY v. PENNOYER CREEK IMPROVEMENT COMPANY.

ing thereto.—*Kroop v. Forman*, 31 Mich., 145; *Powers' Appeal*, 29 Id., 504; *Cooley's Const. Lim.*, 528.

The petition alleges that "the said Pennoyer creek is a navigable stream, and was such before the improvements hereinbefore enumerated were made;" that the contemplated improvements are the deepening and straightening the stream and the construction of three dams across the stream, which will cause the water in said stream to be raised and backed up, and the use of the stream for a water-power be lost to the owner of the lands, and that said lands or portions thereof will sometimes be flooded. It being thus alleged that Pennoyer creek was a *navigable stream*, the petition should have alleged affirmatively, that the corporation had obtained authority from the board of supervisors of Newaygo county to dam this stream. The constitution is clear and emphatic that "no navigable stream in this state shall be bridged or dammed without authority from the board of supervisors of the proper county under the provisions of law."—*Article XVIII.*, § 4. There is no allegation that such authority was obtained. The petition does set forth the assent of the governor and attorney general, and the approval of the board of control of the St. Mary's Falls Ship Canal, as required by the act. But this assent and approval is something additional to the authority of the board of supervisors. The legislature did not intend the approval of the state officers to take the place of, or do away with, the authority of the board of supervisors. Any such attempt would have been unconstitutional, and this we cannot attribute to the legislature.

There is also, we think, a fatal defect in the act itself. The act does not provide for the appointment of commissioners, or point out their duties, except by reference to sections thirteen to twenty-five inclusive, of an act entitled "an act to provide for the formation of companies to construct plank roads," approved April 8, 1851.

While we do not question the right or power of the legis-

CLAY V. PENNOYER CREEK IMPROVEMENT COMPANY.

lature to thus refer to the provisions of another statute, and render them applicable and binding as though incorporated and re-enacted in the act under consideration, yet such a method of incorporating certain sections of previous statutes in subsequent acts, must be confined to cases where the sections so referred to are germane to the latter act; where it will not be necessary that parties should either omit from or add important words or provisions to the sections referred to in order to render them applicable. When such changes become necessary, it is leaving to each party acting under the statute the power to change it to suit his convenience, and thus to legislate for himself. And when he has done so there is no certainty at all that the legislature, had its attention been specially called thereto, would have made like changes, or if it had, that the act would have become a law by receiving the approval of the governor.

The plank road act referred to authorizes corporations formed thereunder to enter upon and take possession of and use such lands as may be necessary for the purpose of constructing and maintaining thereon its road, toll houses, gates, fixtures and appurtenances. And the sections referred to authorize commissioners to be appointed "to ascertain and determine whether it be necessary to the public interest to take such lands for the proposed road, and if so, to ascertain and determine the amount of damage therefor." They are to "hear any reason that may be deemed pertinent, which may be urged for or against the necessity of constructing such road, or the necessity of taking therefor any lands of any person *through which the same may pass*, and they may take any testimony having a bearing upon the question of such necessity, and in respect to the amount of damages to any person or persons for the taking of any such lands for the purposes aforesaid."

Section thirteen of the act for the improvement of rivers prescribes the powers of corporations in making their improvements.—*Comp. Laws*, § 2728. The third subdivision of that section is as follows: "To divert into such stream

CLAY v. PENNOYER CREEK IMPROVEMENT COMPANY.

to be improved waters from any lake or lakes in the vicinity thereof, by canals to be constructed for that purpose; to divert the water from the present channel of the stream to be improved by cutting across bends in said river; to flood lands by constructing the necessary dams, according to the plans approved as aforesaid, and to enter upon, take, and use any lands which may be necessary for the purpose of constructing and maintaining such works and improvements, provided that the necessity for such diversion of the water, flooding of lands and of taking such lands for such purposes, and the damages to be paid therefor, in each case of diversion of water, flooding of land, or taking of the same, shall be ascertained, and such damages paid, as provided for in section thirteen," etc., of the plank road act referred to. It is very evident that for commissioners to ascertain and determine whether it would be necessary to the public interest to take any lands through which the proposed improvement would pass, and if so to ascertain and determine the amount of damages therefor, would fall far short of meeting all the various and complicated questions which would necessarily arise where the corporation sought to carry out the very important powers given them in the third subdivision above quoted. To appoint commissioners to hear any reasons that might be deemed pertinent against the diversion of the waters of lakes, or of rivers, and many others which would arise, and yet confine such reasons and testimony to the necessity of improving the navigation of the river, would be to confine them to the question of perhaps minor importance.

The improvement might be a necessity, but the means proposed to accomplish that end wholly unnecessary. Yet we do not see how the inquiry can be broader, without enlarging the inquiry authorized by the sections referred to in the plank road act.

The sections referred to must be treated as though they had been re-enacted at length in this act, and without any changes having been made therein. Had this been done,

CLAY v. PENNOYER CREEK IMPROVEMENT COMPANY.

then the inquiry of the commissioners would have been limited as we have just stated. A reference merely to a section of another statute, in this manner, can no more broaden it or enlarge its scope than could its literal re-enactment in the new statute in the place it was designed to fill. In neither case, without some change in the phraseology, can its provisions be materially enlarged, while it may very materially limit the effect of the act of which it has thus become a part.—*Mok v. Detroit Building etc., Co.*, 30 Mich., 511; *United States v. Bassett*, 2 Story, 403.

Without pursuing this question further, or referring to any of the other questions raised, we are of opinion that the proceedings in the probate court appointing commissioners should be quashed and held for naught, with costs to plaintiff.

The other Justices concurred.

**The People on the relation of The Attorney General
v. The Board of Supervisors of Benzie County.**

Removal of county seat: Canvass of votes: Final action: Reconsideration.

The action of the board of supervisors in canvassing and declaring the result of a popular vote, upon a proposition for the removal of the county seat, being final, any subsequent action by them, reconsidering and reversing their previous canvass and declaration, is without force.

Heard and decided June 7.

Application for *mandamus*.

S. W. Fowler and *A. J. Smith*, for relator.

Hughes, O'Brien & Smiley, for respondents.

ATTORNEY GENERAL v. SUPERVISORS OF BENZIE COUNTY.

PER CURIAM:

This is an application for an order to show cause why the respondents should not set aside and vacate certain action recently taken by them at Benzonia, which place, in taking the action, they recognized as the county seat. The application is based on an assumption that the county seat still remains at Frankfort, where it was first located. It appears that several years since the question of the removal of the county seat from Frankfort to Benzonia was duly submitted to a vote of the people, and that the vote on such submission was duly canvassed by the supervisors, who declared the proposition carried. Two or three years later the supervisors assumed to reconsider this action, and declare the proposition not carried. But this last action was clearly invalid within our previous decision in *Atty. Genl. v. Supervisors of Lake County*, 33 Mich., 289. The board was therefore warranted in treating it as invalid, and in continuing to recognize Benzonia as the county seat.

The motion for an order to show cause must be denied.

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Zebedee Macomber v. Jerome E. Nichols.

Injury: Recovery: Lawful acts: Common rights. Injury alone will not support an action on the case; there must be a concurrence of injury and wrong; and if the act be not unlawful in itself, then unless done in a manner, at a time or under circumstances, which render it wrongful or lacking in due regard for the rights of others, there can be no liability for any injury that may result.

Highways: Public use: Restrictions: Inconveniences incident to reasonable use. A highway is a public way for the use of the public in general, for passage and traffic, without distinction; and the restrictions upon its use are only such as are calculated to secure to the general public the largest practicable benefit from the enjoyment of the easement, and inconveniences such as are only incident to a reasonable use under impartial regulations are not actionable.

MACOMBER v. NICHOLS.

Highways: Horses: Superior privilege: Improved methods of locomotion.

Persons making use of horses as the means of travel or traffic by the highways have no rights therein superior to those who make use of the ways in other permissible modes; improved methods of locomotion are admissible, and cannot be excluded from existing public roads if not inconsistent with the present methods.

Highways: Unsightly objects: Frightening horses of ordinary gentleness.

In an action for injuries caused by a horse taking fright on the highway at an engine being propelled by steam, it is error to permit the right of recovery to turn upon whether the engine was calculated to frighten horses of ordinary gentleness; the bringing of an unsightly object into the common highway is not necessarily a wrong because of its tendency to frighten horses, any more than the construction of a bridge over a river is a wrong because of its tendency to delay vessels.

Highways: Horses: Steam locomotives: Superior privilege: Negligence.

If one in making use of horses as a means of locomotion on the highway is injured by the act or omission of another using a steam locomotive, the question is not one of superior privilege, but whether under all the circumstances there is negligence imputable to some one, and if so, who should be accountable for it.

Highways: Engines: Negligence: Reasonable management: Question of fact.

The engine as a means of locomotion in the highway is not necessarily a nuisance, and the question whether its use as such has in a particular instance been so negligently managed to the injury of others as to give rise to a right of action, is one of fact for the jury as a question of reasonable conduct and management on the part of both parties.

Heard April 12. Decided June 13.

Error to Calhoun Circuit.

I. G. Pray, for plaintiff in error, cited: 14 *Gray*, 242; 35 *N. H.*, 257; 7 *Barb.*, 508; 13 *Barb.*, 658; *Redf. on Ry's*, 520; 28 *Mich.*, 32; 1 *Allen*, 190.

May, Buck & Fraser, for defendant in error, cited: *Congreve v. Smith*, 18 *N. Y.*, 79; *Conklin v. Thompson*, 29 *Barb.*, 218; *People v. Cunningham*, 1 *Den.*, 524; *Bartlett v. Hooksett*, 48 *N. H.*, 18; *Knight v. Good-year Co.*, 38 *Conn.*, 438; *Ayer v. Norwich*, 39 *Conn.*, 376; *Young v. New Haven, Ib.*, 435; *Foshay v. Glen Haven*, 25 *Wis.*, 288; *Morse v. Richmond*, 41 *Vt.*, 435; *Pa. R. R. v. Barnett*, 59 *Penn. St.*, 259; *Lake v. Milliken*, 62 *Me.*, 240; *Darling v. Westmoreland*, 52 *N. H.*, 401; *Mahoney v. R. R. Co.*, 104 *Mass.*, 73; *Thomas v. Telegraph Co.*, 100 *Mass.*, 157; *Baker v. Portland*, 58 *Me.*, 199.

MACOMBER v. NICHOLS.

COOLEY, CH. J:

This is an action on the case, in which Nichols sought to recover for an injury occasioned by his horse taking fright as he was driving along the public highway near Battle Creek about 9 o'clock in the evening of September 9, 1874. The fright was caused by an engine mounted on wheels, which the defendant was moving along the same highway by means of the steam power by which it was operated. The engine was used mainly for threshing, and was moved from place to place for that purpose. The traveled part of the highway at the place of the accident was about thirty feet in width, and Macomber gave evidence tending to show that he was moving on the extreme right of this traveled way, and that he shut off steam and stopped the engine when the horse was seen approaching. Each party claimed to be free from negligence himself, and charged negligence upon the other. The following instructions, among others, were given to the jury at the request of Nichols:

"1. If you find that about the 9th day of September last the plaintiff was driving a well-broken and gentle horse in the public street or highway in Battle Creek, in this county, that the defendant by running a steam engine along said highway caused plaintiff's horse to run away, and that plaintiff was thereby injured, either in person or property, and that such steam engine was well calculated to frighten horses of ordinary gentleness, then the plaintiff is entitled to recover.

"2. The right to travel in a public highway is a right which is common to all, and no person has the right to impede or render dangerous the travel of the highway by any other person.

"3. A party placing upon the highway any vehicle unusual, and calculated from its appearance and mode of locomotion to frighten horses of ordinary gentleness, is liable for all damages resulting therefrom.

"4. It is no defense to this suit that the defendant was

MACOMBER v. NICHOLS.

using the steam engine in the transaction of his lawful and legitimate business, if his use of the highway in such business rendered the highway dangerous for others to travel.

"5. The defendant had no right to run his steam engine on the public street or highway if such engine was calculated to frighten horses of ordinary gentleness."

Other instructions of similar import were given, but the foregoing are all that need be stated to make clear the view which was taken by the circuit judge of the main point in controversy.

It is hardly probable that when the circuit judge told the jury that no person has a right to impede or render dangerous the travel of the highway by any other person, he intended them to understand this language literally and without qualification. Almost any proper use of a highway may under some circumstances impede the use by another, and possibly render it dangerous. The appearance of any unusual object in the streets may have some tendency to add to the dangers of travel by means of horses or other animals, and there is always more or less danger that a high spirited horse, or indeed any other horse, may become unmanageable, and people who are using the highway be exposed to risks in consequence. But it does not follow that the driver of such a horse is responsible for the consequences because of his bringing him into the street impeding or rendering dangerous the travel by others. The question is one of reasonable use and reasonable care, and if these are observed he is not chargeable. Probably the circuit judge did not intend to be understood as going beyond the requirement of reasonable care and caution on the part of all persons making use of the public ways; and this instruction, if it stood alone, would not have been likely to mislead.

But the instruction that any one placing upon the highway a vehicle unusual, and calculated from its appearance and mode of locomotion to frighten horses of ordinary gentleness, is liable for all damages resulting therefrom, is not

MACOMBER v. NICHOLS.

only erroneous, but it could not fail to mislead. It was an instruction, in substance, that the placing of such a vehicle in the highway is always, and under all circumstances, an illegal act; a wrong in itself, for which an action will lie on behalf of any one who may chance to be injured in consequence.

Injury alone will never support an action on the case; there must be a concurrence of injury and wrong. If a man does an act that is not unlawful in itself he cannot be held responsible for any resulting injury unless he does it at a time or in a manner or under circumstances which render him chargeable with a want of proper regard for the rights of others. In such a case the negligence imputable to him constitutes the wrong, and he is accountable to persons injured, not because damage has resulted from his doing the act, but because its being done negligently or without due care has resulted in injury. If the act was not wrongful in itself, the wrong must necessarily be sought for in the time or manner or circumstances under which it was performed, and injury does not prove the wrong, but only makes out the case for redress after the wrong is established.

Persons making use of horses as the means of travel or traffic by the highways have no rights therein superior to those who make use of the ways in other modes. It is true that locomotion upon the public roads has hitherto been chiefly by means of horses and similar animals, but persons using them have no prescriptive rights, and are entitled only to the same reasonable use of the ways which they must accord to all others. Improved methods of locomotion are perfectly admissible, if any shall be discovered, and they cannot be excluded from the existing public roads, provided their use is consistent with the present methods.

A highway is a public way for the use of the public in general, for passage and traffic, without distinction.—*Starr v. C. & A. Railroad Co.*, 4 Zab., 597. The restrictions upon its use are only such as are calculated to secure to

MACOMBER v. NICHOLS.

the general public the largest practicable benefit from the enjoyment of the easement, and the inconveniences must be submitted to when they are only such as are incident to a reasonable use under impartial regulations. When the highway is not restricted in its dedication to some particular mode of use, it is open to all suitable methods; and it cannot be assumed that these will be the same from age to age, or that new means of making the way useful must be excluded merely because their introduction may tend to the inconvenience or even to the injury of those who continue to use the road after the same manner as formerly. A highway established for the general benefit of passage and traffic must admit of new methods of use whenever it is found that the general benefit requires them; and if the law should preclude the adaptation of the use to the new methods, it would defeat, in greater or less degree, the purpose for which highways are established.

It is not long since the great highways by water were supposed to be of such transcendent importance as to entitle those who made use of them to superior rights over those making use of other highways which might intersect them. Accordingly bridges over navigable waters, when permitted at all, were required to be so constructed as to secure to vessels an uninterrupted passage, and the travel and traffic by land was compelled to await the convenience of travel and traffic by water. But this rule was never inflexible; it was a rule that must yield to circumstances; and it was never a matter of course that the master of a vessel was entitled to a remedy as for a legal injury when the convenience of one making use of a bridge was preferred to his. The case was one in which rights must be harmonized, and unavoidable inconveniences to one party or the other must be submitted to as something inseparable from any employment of the powers of government to provide or regulate the channels for travel and commerce. There may be, in any case in which a highway by land intersects a highway by water, questions of difficulty as to whether, in view of all the cir-

MACOMBER v. NICHOLS.

cumstances, the one or the other is of the greater importance, and whether the general public would be better accommodated by compelling those making use of the one to submit to temporary inconvenience for the accommodation of those passing or moving property by the other; or, on the other hand, by recognizing in the former such paramount rights as are not to be narrowed or encroached upon by any rights possessed by the latter. Over unimportant streams a bridge may do far more to accommodate the public than the navigable privilege; and the unreasonableness of a refusal to recognize the fact when legal rights are found to depend upon it, is very manifest. The paramount rights which have been asserted on behalf of vessel owners as against railroad companies have been very distinctly denied, the court, holding that they must submit to any incidental inconvenience that may be inseparable from allowing to the public the benefit, of improved locomotion by land.—*Works v. Junction R. R.*, 5 *McLean*, 425, 438; *Spooner v. McConnell*, 1 *McLean*, 337, 379; *Jolly v. Terre Haute Bridge Co.*, 6 *McLean*, 237, 242; *Miss. & Mo. R. R. Co. v. Ward*, 2 *Black*, 485. It follows that a bridge over a navigable stream is not of necessity a nuisance; it may or may not be such, according to the circumstances; and the vessel owner who brings his suit for an injury occasioned by it must show the circumstances which make the injury fairly chargeable to some one as a wrong.

But the bringing of an unsightly object into the common highway is no more of a wrong because of its tendency to frighten horses of ordinary gentleness, than is the construction of a bridge over a river a wrong because of its tendency to delay vessels. The one may be a wrong under some circumstances, and so may the other; but it is equally true that both may be proper and lawful under other circumstances. It would be difficult to pass through the streets of our large towns without encountering objects moving along them which are well calculated to frighten horses of ordinary gentleness until they become accustomed to them; but

MACOMBER v. NICHOLS.

which nevertheless are used and moved about for proper and lawful purposes. The steam engine for protection against fire may be mentioned as one of these; and though this is usually owned and moved about by public authority, there can be no doubt of the right of a private individual to keep and use one for his own purposes, and to take it through the streets when necessary. But other things which are sometimes moved about on wheels along the streets are equally alarming to horses when first used. Wild animals collected and moved about the country for exhibition are always more or less likely to frighten domestic animals, but they may nevertheless be lawfully taken on the public highways under proper precautions.

It has justly been remarked by the supreme court of Illinois in a case involving the right to make use of steam as a means of locomotion in the public streets, that "a street is made for the passage of persons and property, and the law cannot define what exclusive means of transportation and passage shall be used." "To say that a new mode of passage shall be banished from the streets, no matter how much the general good may require it, simply because the streets were not so used in the days of Blackstone, would hardly comport with the advancement and enlightenment of the present age."—*Moses v. P., F. W. & C. R. R. Co.*, 21 Ill., 516, 523. In some of the large cities of the country sufficient means of transit by the old methods have become practically out of the question, and steam power is permitted as a matter of necessity, not only as a means of moving vehicles by the side of teams in the street, but also over their heads, where the liability to cause fright would perhaps be still greater. Horses of ordinary gentleness would at first be liable to take fright, but after a time they become accustomed to the objects that at first are so fearful to them, just as in the country they become accustomed to see trains of cars passing near them along the ordinary railways, which sometimes for a considerable distance run in immediate proximity to the common roads. Horses may be, and often

MACOMBER v. NICHOLS.

are, frightened by locomotives in both town and country, but it would be as reasonable to treat the horse as a public nuisance from his tendency to shy and be frightened by unaccustomed objects, as to regard the locomotive as a public nuisance from its tendency to frighten the horse. The use of the one may impose upon the manager of the other the obligation of additional care and vigilance beyond what would otherwise be essential, but only the paramount authority of the legislature can give to either the owner of the horse or the owner of the locomotive exclusive privileges. If one in making use of his own means of locomotion is injured by the act or omission of the other, the question is not one of superior privilege, but it is a question whether, under all the circumstances, there is negligence imputable to some one, and if so, who should be accountable for it.

In the circuit court instructions were given on the subject of mutual negligence, which are probably unexceptionable; but they seem to have been entirely unimportant, because the other instructions, which treated the use of the engine in the public highway as unlawful, necessarily disposed of the case. We think the instructions last mentioned were erroneous. The engine as a means of locomotion in the highway was not necessarily a nuisance. It might possibly be a nuisance at some times, and under some circumstances, and even where it might be proper to make use of it the manager or owner might be liable to damages for negligence in management to the injury of others. But the question in any such case must be one of fact; a question of reasonable conduct and management on the part of both parties; and should be submitted to the jury as such.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

WILKINSON v. GREEN.

Hannah A. Wilkinson v. Jacob Green and others.

Foreclosure: Parties: Subsequent purchasers: Multifariousness. A foreclosure bill which makes certain parties defendants as subsequent purchasers or incumbrancers is not multifarious because it alleges that such defendants claim some adverse interest.

Foreclosure: Parties: Subsequent purchasers: Adverse title. A title which is adverse and paramount to that of both mortgagor and mortgagee cannot be litigated in a foreclosure suit; but the question whether an asserted claim is such an adverse one as to come within this rule, depends not upon what is set up in the answer in regard to it, but rather upon what the bill charges and the proofs show to be its real character.

Mortgage foreclosures: Subsequent purchaser: Releases obtained to cure defects: Adverse title: Decree. Where a subsequent purchaser of the mortgaged premises from the mortgagor, has, in order merely to perfect his title of record, procured quit-claim deeds from the mortgagor's grantors under such circumstances as would render it fraudulent for him to set up such conveyances as a title adverse and paramount to that of the mortgagor, the mortgagee, under proper allegations in his foreclosure bill, may have such alleged adverse title declared null and void.

Conveyances: Delivery of possession: Estoppel: Releases obtained to cure defects. Parties who have obtained possession of lands from their grantor cannot afterwards repudiate his title, and all releases thereafter procured by them to cure defects in the title of such grantor must be held to have been obtained in support of, and not for the destruction of such title.

Submitted on briefs April 14. Decided June 13.

Appeal in Chancery from Ionia Circuit.

Spaulding & Cranston, for complainants, cited: *Van Rensselaer v. Kearney*, 11 How., 322; *Jackson v. Ball*, 1 Johns. Cas., 91; *Graham v. Meek*, 1 Ore., 325; *Cummings v. Freer*, 26 Mich., 128; *Wales v. Newbould*, 9 Mich., 45; *Payne v. Avery*, 21 Mich., 524.

A. W. Dodge, for defendant Ingalls, cited: 3 Mich., 448; 10 Ib., 453; 28 Ib., 125; 6 Paige, 637; 1 Ves., 120; 19 How., 271.

MARSTON, J:

The bill in this case was filed to foreclose a mortgage executed by Jacob Green to Chauncey Lott, May 13, 1854,

WILKINSON V. GREEN.

and recorded October 19, 1854, to secure certain notes which were subsequently assigned to the complainant. The bill contains the usual formal allegation that defendants Ingalls and others claim to have rights in the premises as subsequent purchasers, etc., and alleges that defendants Ingalls and Woodruff also claim some interest or title in or to the premises, adverse to complainant's title, under two certain quit-claim deeds, one from John Estep, dated January 5, 1866, the other from Chauncey Lott, dated August 16, 1865, both to Charles W. Ingalls, grantor of Hall J. Ingalls and Woodruff; alleges that the Ingalls and Woodruff, at the time of the execution and delivery of these deeds, knew that Lott and Estep had no title to these lands, having previously conveyed them to the mortgagor Green, and that such deeds were obtained by Ingalls to cheat and wrong complainant.

Defendants Hall J. Ingalls and Woodruff answer jointly, admitting the execution of the notes and mortgage by Green, and that complainant owns the same; they deny that Green had any title or interest in the mortgaged property at the time he executed the mortgage, and deny that Lott ever conveyed these lands to Green; they set up that they are the owners of the lands in fee simple, each claiming in severalty, having purchased the same in good faith, paying a valuable consideration therefor, and without any knowledge that Green at the time the mortgage was executed had, or claimed to have, any title to the lands. Their answer also contains a demurrer to the bill for multifariousness. Replication was filed, the bill by stipulation dismissed as to Woodruff, proofs taken and a decree rendered in favor of complainant. To so much of the case as sought to litigate the alleged adverse title of Hall J. Ingalls under the deeds of Lott and Estep to Charles W. Ingalls, the grantor of Hall J., the bill was dismissed without prejudice. From this decree complainant appealed.

The first question arises upon the demurrer for multifariousness. This demurrer is not well taken. The bill contains the usual clause that these defendants claim some inter-

WILKINSON v. GREEN.

est in the premises as subsequent purchasers. This being so, any right which they thus acquired would be subject to the mortgage and would entitle complainant to the right to make them parties defendants for the purpose of foreclosing all interests which they derived from the mortgagor subsequent to complainant's mortgage.—*Horton v. Saunders*, 13 Mich., 413. Nor does the fact that the bill alleges defendants claim some adverse interest, protect them from being made parties as to the interest claimed by them which is not adverse.—*Ibid.*

The question still remains whether this alleged adverse interest can be litigated in this case. This depends not so much upon what defendant Ingalls claims in his answer, but upon the allegations in the bill and the testimony in the case as to the nature of the alleged adverse claim. Should it appear that defendant has a legal title, which, if valid, is adverse and paramount to the claim of both mortgagor and mortgagee, then undoubtedly this is neither a suitable proceeding, nor the tribunal the appropriate one in which to settle and determine that question.—*Summers v. Bromley*, 28 Mich., 126.

Should it appear, however, that Ingalls was in fact a subsequent purchaser of the mortgaged premises from the mortgagor, and that in order merely to perfect his title of record he afterwards obtained quit-claim deeds from the mortgagor's grantors, then I can see no good reason why the entire question, under the allegations contained in the bill, may not be disposed of in this case. The allegation in the bill is, that Ingalls claims some interest or title in the premises adverse to complainant under a quit-claim deed from John Estep dated January 5, 1866, and one from Channcey Lott dated August 16, 1865, and that he and his grantor, Charles W. Ingalls, well knew at the time of the execution and delivery of these deeds that Lott and Estep had no title to said lands, having before that time conveyed the same to said mortgagor Green, whom they well knew was at the time of making said mortgage the owner in fee

WILKINSON v. GREEN.

simple of said premises, and that said quit-claim deeds were obtained fraudulently, etc.

This charge then is, that Green at the time he executed this mortgage in 1854, was the owner in fee simple of the premises described therein, and that he acquired his title thereto from or through Estep and Lott; that notwithstanding full knowledge of these facts on the part of defendant Hall J. Ingalls, and his grantor Charles W., they fraudulently, in order to cheat and wrong complainant, obtained the quit-claim deeds from Lott and Estep in 1865 and 1866. As before stated, the bill charges that Hall J. Ingalls claims an interest in the premises as a subsequent purchaser, and also that he claims this Estep and Lott title as an additional and adverse title. A title so acquired can in no sense be held adverse and paramount to the claim of the mortgagee. There is nothing therefore in the bill which will prevent our examining the facts in order to ascertain whether complainant is entitled to the relief asked for, viz.: an ordinary decree of foreclosure, and that the alleged adverse title of Ingalls may be declared null and void.—*Adams v. Bradley*, 12 Mich., 346; *Cummings v. Freer*, 26 Id., 134.

There is and can be no question but that Lott became the owner in fee simple of the premises in question upon the 10th day of February, 1853, under and by virtue of a warranty deed from John Estep, which deed purports to have been recorded upon the 17th of March, and also the 2d of June, 1853. Estep acquired his title from Charles W. Ingalls by warranty deed dated January 16th, 1853, and recorded March 17th, of the same year. There was nothing in the register's office to show that Lott had disposed of his title until August 22d, 1865, when a quit-claim deed dated August 16th, 1865, from him to Charles W. Ingalls was recorded. The mortgage in question from Jacob Green to Chauncey Lott, bears date May 13th, 1854, and was recorded October 19th, of that year. There was not then, nor has there been at any time since, any record evidence

WILKINSON v. GREEN.

in the register's office of any conveyance from Lott to Green, or of any title whatever in the latter. The evidence clearly shows, however, that on the same day this mortgage bears date a deed of the mortgaged premises was executed by Lott and wife to Green, and delivered to him, and that the mortgage in question was executed to secure a part of the purchase money. This deed could not be found, but both Green and Lott swear positively that such a deed was then executed and delivered, and their testimony in this respect is not weakened by any thing in the case, while the probabilities all point the same way. It also appears from Charles W. Ingalls' testimony, that Green entered into the actual possession of the premises in 1854, remained therein and was residing thereon January 15th, 1863, when under and by virtue of an agreement with him (Charles) he (Green) conveyed the premises to Hall J. Ingalls, Charles giving his own note for two hundred dollars to Green, as the consideration for such conveyance. As this was the first interest acquired by Hall J. to the premises, Charles not then claiming any interest therein, it may, perhaps, be best to here ascertain what the Ingalls supposed they were purchasing, and as the agreement was made, and the consideration paid by Charles W., and the deed given at his request to his son Hall J., we will speak of them together as being equally acquainted with the facts. Jacob Green testified that at the time he made the agreement with Charles W. Ingalls under which the conveyance to Hall J. was executed, he informed Charles of this mortgage given to Lott; that it was then held by one Wilkinson, and that Charles agreed to pay this mortgage in addition to the two hundred dollar note given by him to Green; that Charles then knew he, Green, had bought the premises from Lott, and he thinks he then delivered to Charles the deed of May, 1854, which he had received from Lott. Charles W. Ingalls testified as follows: "I lived not a great ways from Mr. Green, who occupied these premises at the time I first purchased them. He told me that he owned the premises. I purchased them

WILKINSON v. GREEN.

of him and paid him three hundred dollars for a quit-claim; after a time I was informed that he had no title. I then went to Mr. Lott, presuming the title to be in him; Mr. Lott informed me that such was the fact, that if I would pay him the remainder due him from Mr. Green, he would give me a deed. I was informed at the time Mr. Green went into possession of the premises, some five or six years previous. I understand he purchased of Mr. Lott."

It would seem to be clear therefore, that Green was in the actual possession of the mortgaged premises as owner thereof; that Charles W. Ingalls, with full knowledge of both the possession and claim of ownership, purchased the premises from Green and had them conveyed direct to his son. If his testimony is to be believed, he then supposed that Green was the owner, and that he, Ingalls, was acquiring his, Green's, title. He does not deny that Green informed him of this mortgage and that he agreed to pay it as a part of the consideration; but even if he did not have such knowledge or make such an agreement, the mortgage was then properly recorded and he acquired Green's title subject to the obligations then of record against it. It also appears that in October, 1858, Green, by warranty deed, conveyed these premises to William Osman, as a security for certain moneys, Osman giving back an agreement to re-convey upon re-payment of the amount. This agreement to re-convey, together with tax receipts and other papers relating to the land, Green testified he delivered to Charles at the time of his conveyance to Hall J. in January, 1863. And it appears that a deed was obtained of the premises from Osman's executors to Hall J., May 5th, 1863.

When we come to examine the deeds subsequently obtained from Lott and Estep, we will find that Charles W. did not at that time suppose he was acquiring an independent adverse title to what he had received from and through Green, but one subordinate to it. In speaking of his purchase from Green, he says: "After a time I was informed that he had no title,—Mr. Lott informed me that such

WILKINSON v. GREEN.

was the fact, and that if I would pay him the remainder due him from Mr. Green, that he would give me a deed." He again says: "I asked him (Lott) for a deed of this land, he answered me like this: that there was a matter due him from Mr. Green that had never been paid, and that Mr. Green had never had a deed, nor I couldn't have one without paying him that amount of cash that Green owed him. I agreed to do it. He reckoned it up and it was between thirty and forty dollars in greenbacks. I paid it. I think it was somewhere near thirty-four dollars which he said Jacob Green owed him. I paid him that amount of money." He also testified that when he took his deed to the register's office for record, he was told that neither Lott nor Green had any title in the land whatever, that then finding the title remained in Estep, he purchased and took a deed from him. It is thus very evident that he was simply trying, if acting honestly, in this manner to perfect the title of record which he had acquired through Green. The consideration paid by him tends to the same conclusion. Although he valued the premises at sixteen hundred dollars, he only paid Estep and Lott one hundred dollars, while he paid to Green and the Osman estate, for the Green title, at least one thousand dollars. The facts all tend to show that the only title he acquired or supposed he was acquiring, he obtained from and through Green.

It is therefore apparent to my mind that Hall J. Ingalls did not acquire through the Lott and Estep deeds any adverse claim or title to the mortgaged premises; that having purchased from Green, who was in possession, and who was at that time both the legal and equitable owner of the premises, he thereby acquired Green's rights therein, which were subject to the payment of this mortgage; that knowing the parties through whom Green derived his title, if he, Ingalls, thought proper to adopt the course he did to perfect his title of record, in preference to other courses open to him, he did not thereby acquire any new and independent adverse rights which would relieve the land of the bur-

WILKINSON v. GREEN.

thens imposed on it by his grantor Green, nor change his own position from that of a subsequent purchaser to one who could be considered as having acquired an adverse paramount claim. Having first acquired Green's title, who was in the actual possession of the premises, they could not afterwards repudiate it, and all releases obtained by them to cover defects in his title must be held to have been obtained in support of it, and not for its destruction.—*Farmers' & Mechanics' Bank v. Bronson*, 14 Mich., 369.

I am of opinion that complainant is entitled to the relief prayed for, and that the decree of the court below should be changed and made to conform to this opinion, and that complainant recover costs in both courts in full.

The other Justices concurred.

Erastus P. Mason v. Fractional School District No. 1 of Scio and Webster.

School districts: Assessor: Money had and received: Official bonds. An action for money had and received will lie in favor of a school district to recover district moneys received by its assessor and which after expiration of his office he refuses on demand to pay over to his successor, and an action upon the assessor's bond is not the exclusive remedy; the bond is required as additional security, but it does not supersede the officer's individual responsibility.

School districts: Assessors: Accounting to successor: Notice of election and qualification. An assessor cannot lawfully withhold the district funds in his hands when the same are properly demanded by his successor, a fortnight after the latter has been regularly elected and has accepted and qualified, upon any claim that he is entitled to be first personally notified officially of such election and acceptance; he is chargeable with notice of these facts without any personal certification thereof.

Referees: Report: Finding of facts. The finding of facts in a referee's report is not open to review upon exceptions where the proceeding is not so shaped as to raise the question whether any specific finding is unsupported by any evidence.

Report of referee: Omission: Practice. Where it is claimed there has been any improper omission in the report of a referee the remedy is to procure a further finding, and not to seek to raise the question by exception to the report.

MASON v. FRACTIONAL SCHOOL DISTRICT, ETC.

Bill of particulars: Evidence. Where suit is brought against an official treasurer for a balance claimed to be in his hands, and the bill of particulars enumerates a number of items as claimed to have been received by defendant, and then states that the specific demand sought to be recovered is a specified balance with interest, it is not error to permit plaintiff to question defendant as to sums received by him differing from those specified in the bill, where it is clear that no one is misled by it; the real purpose of a bill of particulars is to avoid a surprise at the trial by the bringing forward of unexpected claims.

Official treasurer: Accounting: Regularity of proceedings to raise the public moneys. An official treasurer cannot defend an action to make him turn over to his successor the funds in his official custody, upon any questions of the regularity of the proceedings whereby the funds came into his possession.

Evidence: Moneys paid out on written orders. Where it is claimed money has been paid out on written orders, the orders themselves are the best evidence, and if accessible, the first medium of proof; and the exclusion of parol evidence of such payment, in the absence of any showing that the orders were not producible, is not error.

Submitted on briefs April 19. Decided June 13.

Error to Washtenaw Circuit.

E. D. Kinne and A. J. Sawyer, for plaintiff in error.

H. J. Beakes, for defendant in error.

GRAVES, J:

Mason was assessor of the district from the first Monday of September, 1867, until the first Monday of September, 1872, when, as the district claims, one Patrick Hughes was elected his successor and at once qualified.

It is admitted that in the course of this holding Mason received a large amount of district money, and particularly the sum of three hundred and fifty-three dollars and fifty-two cents. He himself swore to the receipt of various large sums. Hughes, his successor, made demand on him, and he refused to pass any over. The balance charged to be in his hands, and which was demanded, he claimed to have paid out on district liabilities. But the district maintained that, supposing the payments to have been made, the liabilities were not district liabilities at all, and the expenditure was unauthorized. The district sued him for money had

MASON v. FRACTIONAL SCHOOL DISTRICT, ETC.

and received, and sought to recover in that form this balance.

He pleaded the general issue, and gave notice of set-off. Subsequently he asked that the action should be referred, and the court complied with his request. The gentleman appointed, after a hearing consuming two weeks, made a very concise but clear and distinct report in favor of the district for three hundred and fifty-three dollars and fifty-two cents with interest from the third Monday of September, 1872, this sum of three hundred and fifty-three dollars and fifty-two cents being forty cents less than the specific sum claimed by the district before the trial.

The plaintiff in error caused a bill of exceptions to be settled, and also filed exceptions to the report. But the court overruled the exceptions and confirmed the report, and awarded judgment in accordance with it. The case is now before us on writ of error. There are sixty-seven charges of error, but many are without plausibility, and others still have no foundation in the record. It would be quite unprofitable to follow the return to the writ of error and notice each separate exception. In view of the character and relation of the parties, the form of the pleading and the real nature of the controversy, it is manifest that a great deal of testimony was submitted, and many questions started, having no practical materiality whatever. To such extent as the case under indulgent treatment may be supposed to fairly call for particular consideration, I proceed to consider it.

It is objected that the action for money had and received is not a lawful remedy, and that in view of our provisions of law an action on the assessor's bond is the exclusive course. The court think differently. The regulations concerning the giving of security do not exclude recourse directly against the party as upon a common-law liability under the action for money had and received to the use of the district.

The bond is required in order to afford other and greater

MASON v. FRACTIONAL SCHOOL DISTRICT, ETC.

security than the individual responsibility of the person serving, but not to supersede his separate individual responsibility. Suppose by some mischance or oversight or neglect no bond should be obtained, or suppose the bond given should turn out to be insufficient in amount, it would be strange if the law should refuse a remedy against the party himself to recover the district money. Our legislation is open to no construction which will permit an assessor holding district money, and individually able to respond, to set the district at defiance if for any reason there is inability to obtain redress upon the kind of security superadded by the statute, and there is no ground for saying the common-law remedy may not exist as well where the proper and sufficient bond is given as where it is not. But the right of action, apparently clear on principle, has been fully vindicated in judicial decisions.—*Welch v. Frost*, 1 Mich., 30; *Board of Commissioners of Gibson County v. Harrington*, 1 Blackf., 260; *Walton v. The United States*, 9 Wheat., 651; *Allen v. McKeen*, 1 Sumn., 276; *Inhabitants of Adams v. Farnsworth*, 15 Gray, 423; see also *Staples v. French*, 10 N. H., 72, 76; *Arris v. Stukely*, 2 Mod., 260; *Rains v. Commissary of Diocese of Canterbury*, 7 Mod., 146; *Boyster v. Dodsworth*, 6 Term, 681; *Mayor of Harwich v. Gaunt*, 30 E. L. & E., 354; *Inhabitants of Belchertown v. Bridgman*, 118 Mass., 486.

The referee expressly found that Mason's successor (Hughes) was elected and qualified on the first Monday of September, 1872, and that he made demand on Mason on the third Monday to pass over the money, and that Mason refused. Hughes' acceptance and bond, according to the finding, had been on file two weeks when this demand was made, and Mason was chargeable with notice of Hughes' election, and that he had qualified. There was no provision of law for any personal certification of the fact to him, and he cannot insist that any such certification was needful to make it incumbent upon him to pass over any money in his hands. Moreover there is no finding that he took any such

MASON V. FRACTIONAL SCHOOL DISTRICT, ETC.

position. As a member of the corporation, and assessor, his means of knowledge were ample, and there is nothing in the report to indicate that the place was not in fact at once taken by Hughes. The necessary implication is that it was. Hence it must be taken, on the express findings, and in the absence of any thing in the report to raise a doubt, that Hughes at once became assessor in fact.

There is no foundation for the objections to that part of the report concerning Mason's claim to be allowed certain sums paid out by him for counsel fees and printing.

The facts are to be taken as found; they cannot be contradicted or impugned by an exception to the report, except, perhaps, where the proceeding is shaped in such a way as to show that no evidence was given tending to prove them; and no case of that kind is made. The finding of facts is consequently not open to revision here, and the referee found expressly that the payments in question were not on any district indebtedness, and at the same time did not find any thing affording a pretense of right in Mason to have such payments credited to him against the district funds. The objection to the report that Mason's claim for twenty dollars paid to a teacher, was disallowed, has nothing to rest on.

The matter is not mentioned in the report, and there is no fact to show whether it was allowed or not. If there was any improper omission in the finding relating to this matter the way to correct it was by getting a further finding or by some other step in the court below.

The difficulty, if in fact there be any, cannot be reached by alleging error in this court.

This disposes of all objections to the report except the last, which of course is not claimed to have any force. It is a mere formal generality and might better have been omitted.

A bill of particulars was filed at Mason's request. It started out with a claim for four thousand dollars received by him as assessor of the district before September 2, 1872, and then proceeded with an enumeration of items dating

MASON V. FRACTIONAL SCHOOL DISTRICT, ETC.

from September 3, 1867, down to and including June 11, 1872, and then stated the specific demand sought to be recovered by the action as a balance of three hundred and fifty-three dollars and ninety-two cents, with interest from September 2, 1872, after allowing all deductions on account of payments and set off.

Mason, being himself called to the stand by the district, was allowed, against the objection of his counsel, to testify to his receipt as assessor, during the time covered by the bill, of several sums a great deal larger respectively than any in the itemized part of the bill. The objection by his counsel against his so testifying was that there were no such items in the bill. If he needed information on the subject, the bill informed him that the final claim was a balance of three hundred and fifty-three dollars and ninety-two cents of district money retained by him. In theory the purpose of the bill was to preclude his being surprised at the trial by unexpected claims under cover of the common counts.—*Davis v. Freeman*, 10 Mich., 188.

That he was not misled by the bill or the introduction of his own testimony in regard to the sums he had received, is too plain to admit of question.

The bill distinctly indicated, what he must have known very well without it, that the real ground of action was the specified balance, and the substantial question was not whether in point of fact this balance had been received by him, but whether in making certain expenditures it was canceled.

The objection was highly technical, and destitute of all merit.—*Landon v. Sage*, 10 Conn., 302; *Stevenson v. Mortimer*, Cowp., 805.

The objections in regard to showing regularity in raising money received by Mason are without force.

If every municipal treasurer might withhold the public money in his hands from his successor until proof of the regularity of all the proceedings in raising it, there would soon be little chance of raising any except by force. But the inconsistency of these objections with Mason's situation,

MASON v. FRACTIONAL SCHOOL DISTRICT, ETC.

and with the essence of his claim, is noticeable. The money in question was money he had received as district money, and in his official character as assessor, and there is no pretense that the right of the district to it was questioned by the tax-payers or constituents of the corporation, or any body else.

Moreover his own real defense against the claim of the district for this balance involved an admission that the money when he received it was district money, because that defense was, that he as assessor had applied it to district purposes.

On being cross-examined by his own counsel he testified to paying out a certain sum on orders of the director, and added, "mostly written orders." Counsel for the district then observed that if he claimed to have acted on written authority he should produce the orders; and the bill of exceptions states that the referee sustained the objection. The bill is ambiguous here, since there is nothing to show that the ruling imputed to the referee caused the least practical consequence. The testimony had been given when the counsel for the district interposed. There was no motion to strike out, and there is no explanation showing that any thing was stricken out, or that the referee declined to consider the matter referred to. If Mason paid money out on orders drawn upon him, they were the best evidence, and if accessible the first medium of proof, and there was no claim that the orders were not producible. Hence if the inquiry was of any importance, in view of what was really in dispute, and admitting that the ruling was actually effective, it was an unobjectionable ruling.

Complaint is made that the referee ruled differently on a similar objection raised by Mason's counsel; but the statement is not borne out by the facts. The points were not at all similar, and were not subject to the same rule.

On the whole we discover nothing of which plaintiff in error has any legal right to complain, and the judgment must be affirmed, with costs.

The other Justices concurred.

FROST v. LAWLER.

Milton Frost v. John Lawler.

Contract relations: Agency: Authority. Where one under contract to drive another's logs at a fixed sum per thousand has procured board for his laborers upon representations that his principal would pay for the same, the principal will nevertheless not be holden therefor in the absence of any authority in his contractor thus to bind him, without some showing of contract relations between himself and the person furnishing such board; and a promise by the principal to his contractor to pay money for the latter's own benefit, and which was to be chargeable on the contract price, is not an authority to him to incur debts in his principal's name.

Practice: Defendant in error: Appearance: Counsel: Attorneys of record. Where the attorneys of record in the court below are retained as counsel for defendant in error in the supreme court, no formal notice of appearance is required; and counsel for plaintiff in error should recognize and treat the attorneys who appeared of record for the defendant in error in the court below, as his counsel in the supreme court, unless otherwise informed by actual notice.

Practice: Noticing cause for hearing: Service of assignment of errors: Waiver. A defendant in error who notices the cause for hearing, thereby waives any right to complain of failure to serve upon him a copy of the assignment of errors.

Submitted on briefs April 20. Decided June 13.

Error to St. Clair Circuit.

Counsel for defendant in error, when this cause was called, objected to its being heard, upon the ground that no copy of the assignment of errors had been served on them, they being the attorneys for the defendant in error in the court below.

Counsel for plaintiff in error replied that there having been no formal appearance in this court by defendant in error, no service of assignment of errors was required under the rules; and that the cause having been noticed for hearing by defendant in error and placed upon the docket at his instance, the service of a copy of the assignment of errors was thereby waived.

THE COURT held that no formal notice of appearance on the part of defendant in error was necessary; that the proper practice is for plaintiff in error and his counsel to recognize

FROST v. LAWLER.

and treat the attorneys who appeared of record for defendant in error below, as his counsel in this court, unless otherwise informed by actual notice; but that the defendant in error, by noticing the cause for hearing and procuring the same to be placed on the term docket, waived any right to complain of failure to serve a copy of the assignment of errors; and that the motion should therefore be denied.

Maybury & Conely, for plaintiff in error.

Miles & Coe, for defendant in error.

CAMPBELL, J:

Lawler sued Frost on the common counts, and, as his bill of particulars, filed an order on Frost, drawn by one Hiram H. Hunt, junior, for seventy-five dollars and ninety-five cents, payable to John Lawler or bearer, for board bill on the drive on Belle river.

This order was not accepted. Lawler relied on it as made by Hunt as Frost's agent to pay board of men employed in his work of driving logs in 1874.

Hunt had made a written contract with Frost to drive the logs at a fixed sum per thousand. He made the bargain for board with Lawler, who never had any conversation with Frost on the subject of Hunt's agency or of boarding men in Hunt's employ or under his supervision. Lawler acted on Hunt's statements that Frost would pay the board.

There is no evidence in the case tending to prove any agency in Hunt, or any contract relations between Frost and Lawler. By the contract with Hunt the latter was bound to pay his own expenses. If Frost agreed at any time to pay expenses or board bills, upon which it is very doubtful whether the evidence could be admitted against the written contract, it was, as shown by Hunt's testimony, not an authority to Hunt to incur debts in Frost's name, but a promise to pay money for Hunt's own benefit, and which would be chargeable on the contract price. The testimony

FROST v. LAWLER.

falls directly within the rule of *Wells v. Martin*, 32 Mich. R., 478. It had no tendency to show contract relations between Lawler and Frost.

The court erred in not charging that on the pleadings and testimony plaintiff could not recover.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

James S. P. Hatheway and others v. Edgar Weeks and others.

Estates of deceased persons: Residuary legatees: Executors: Bonds. The relative rights, duties and obligations of ordinary executors and of those who are residuary legatees and have filed a bond merely to pay the debts and legacies, are considered.

Estates of deceased persons: Residuary legatee's bond: Assets: Mistake: Equity jurisprudence. It is not admissible that one who has given the bond usually required of a residuary legatee (to pay the debts and legacies) and taken the estate and enjoyed it with all the rights of absolute owner, should be allowed, when called upon to pay the legacies, to refuse on the ground that the estate turned out not to be so valuable as he had supposed, and to be released from his bond on surrendering up the assets to be administered in the usual way.

Residuary legatee's bond: Administration. And it is nothing to the point that the estate has thus far been honestly and economically administered, and that therefore the legatees have lost nothing; nor does it aid the matter as to those who stand out, that the majority of the legatees assent.

Residuary legatee's bond: Debts and legacies: Sufficiency of assets. A residuary legatee's bond is holden for payment of the debts and legacies at all events, and the sufficiency of the assets is one of the risks the residuary legatee voluntarily assumes when he elects to give such bond instead of the ordinary executor's bond; and equity cannot relieve him from that risk. The giving of such bond conclusively admits assets.

Practice: Injunction bill: Bond to pay judgment: Decree. Where complainants in an injunction bill have been required to file a bond to pay the judgment which they sought to stay, in case they should fail to invalidate it the final decree dismissing the bill may properly require payment of the judgment.

Submitted on briefs April 20. Decided June 13.

Appeal in Chancery from Macomb Circuit.

HATHEWAY v. WEEKS.

Norris & Uhl, for complainants.

R. P. & J. B. Eldredge, for defendants.

MARSTON, J:

Upon the 25th day of October, 1871, Gilbert Hatheway made his last will and testament. By it he made specific bequests to different parties, aggregating in amount one hundred thousand dollars. All the rest, residue and remainder of his property and estate, of every name and nature, real, personal and mixed, he gave, devised and bequeathed to his son James S. P. Hatheway and his heirs forever, he, the said James, to pay all his debts, legacies and bequests. James was by the will designated and appointed sole executor, with full power to sell and dispose of the estate.

On the 26th day of the same month the testator died. The will was admitted to probate December 2, 1871, and the executor named therein required to give bond in the sum of two hundred thousand dollars for the faithful performance of his duty.

In accordance with such order a bond was executed, reciting that said James S. P. was executor and residuary legatee under and by said will. It then proceeded as follows: "Now, therefore, the condition of the present obligation is such that if the above bounden James S. P. Hatheway shall pay all the debts, legacies and costs of administration, due or to become due from said estate, then the before written obligation to be void and of no effect, otherwise to abide and remain in full force, virtue and effect."

This bond was dated December 2d, 1871, and at a session of the probate court held December 14th it was examined and approved, and ordered filed and recorded in the probate office.

Among the bequests made in the will was one of fifteen thousand dollars to the village of New Baltimore. This not having been paid, the village was, by an order of said court, of December 9, 1873, authorized to sue the obligor and his

HATHEWAY v. WEEKS.

sureties upon said bond, and in February, 1874, suit was commenced, which resulted in a final judgment being rendered November 18, 1874, in favor of the village, for upwards of seventeen thousand dollars. This judgment was afterwards, on error to this court, affirmed at the June term, 1875. Upon the 29th of June, 1875, execution was issued and a levy made upon property of James S. P. Hatheway.

Upon the 15th day of July, 1875, James, for himself and for the relief of the sureties, filed a bill of complaint in the circuit court for the county of Macomb in chancery. The above facts are all set forth therein and it is also therein alleged that complainants supposed and believed, shortly before and after the giving of said bond, that the value of the testator's estate, both real and personal, was two hundred and two thousand dollars, whereas it turns out that the estate falls far short of this amount; that there was supposed to be some sixty thousand dollars in government bonds deposited, which cannot be found; that another item of eighty thousand dollars, believed to be advanced at twelve and a half per cent. per annum, and also an interest in the profits of the business in which the money was employed, was, after investigation by complainant, acting upon legal advice, compromised at fifty thousand dollars in real and personal property. Other supposed amounts in much the same condition are set forth, as are also various other matters not necessary to be here referred to. The relief prayed for is as follows:

1. That each and all the defendant legatees under the will be enjoined from attempting to enforce payment of their legacies from complainant as executor or by suit upon said bond;
2. That all further proceedings to enforce the lien by virtue of a levy under the execution be enjoined;
3. That complainant and his sureties be released and discharged from the penalties and conditions of said bond, and that said judgment and all subsequent proceedings thereunder be vacated, annulled, and held for naught;

HATHEWAY v. WEEKS.

4. That said estate may be administered in the probate court, by complainant or some other suitable person, as administrator with the will annexed;

5. That the assets of said estate be marshaled and an account be had with complainant; that all just debts and reasonable disbursements made by him be allowed and adjusted, and that the legatees receive only their *pro rata* share of the estate;

6. That the fifth clause in the will, under which the village claims, be construed;

7. That a guardian *ad litem* be appointed for the minors; and for general relief.

To this bill the village, the judge of probate, and the sheriff, each of whom were made parties defendants, demurred. The demurrer was sustained, and the bill dismissed as to those defendants. An order was on the same day made and entered that complainants do forthwith pay the amount of the judgment rendered in favor of said village.

From the decree dismissing the bill, and this order, complainant Hatheway, for himself and the other complainants, appealed.

This controversy must depend entirely upon the condition and effect of the bond given by the complainant as residuary legatee. The real ground upon which complainant asks to be relieved is, that the assets turn out not to be so large as he, Hatheway, supposed and believed they would be at the time the bond was given. Conceding this, let us look at the position complainant occupied and the advantages he acquired as residuary legatee, and what the result would be in case the relief prayed for is granted. We must bear in mind at the outset, that any rule here laid down, or any conclusion arrived at, must be one applicable in all similar cases arising hereafter.

Our statute provides that when a will shall have been duly proved and allowed, the probate court shall issue letters testamentary thereon, to the person named executor therein, if he is legally competent, and shall accept the trust and

HATHEWAY v. WEEKS.

give bond as required by law.—2 *Comp. Laws*, § 4364.

“Every executor, before he shall enter upon the execution of his trust, and before letters testamentary shall issue, shall give bond to the judge of probate in such reasonable sum as he may direct, with one or more sufficient sureties, with conditions as follows:

“*First*, To make and return to the probate court within three months a true and perfect inventory of all the goods, chattels, rights, credits, and estate of the deceased which shall come to his possession or knowledge, or to the possession of any other person for him;

“*Second*, To administer according to law and to the will of the testator all his goods, chattels, rights, credits and estate, which shall at any time come to his possession, or to the possession of another person for him, and out of the same to pay and discharge all debts, legacies and charges, chargeable on the same, or such dividends thereon as shall be ordered and decreed thereon by the probate court;

“*Third*, To render a true and just account of his administration to the probate court within one year, and at any other time when required by such court;

“*Fourth*, To perform all orders and decrees of the probate court, by the executor to be performed in the premises.”—§ 4365.

“If, however, the executor shall be residuary legatee, instead of the bond prescribed in the preceding section, he may give a bond in such sum and with such sureties as the court may direct, with a condition only to pay all the debts and legacies of the testator; and in such case he shall not be required to return an inventory.”—§ 4366.

Twenty days are allowed after the probate of the will in which to file either of these bonds.—§ 4367.

Every executor and administrator, within thirty days after his appointment, is required to make and return into the probate court a true inventory of the real and personal property which shall have come to his possession or knowl-

HATHEWAY v. WEEKS.

edge, "excepting only, that an executor who shall be residuary legatee, and shall have given bond to pay all the debts and legacies, as provided by law, shall not be required to return an inventory."—§ 4401, as amended by *Act No. 136, S. L. 1875, p. 163.*

The executor is chargeable with the whole of the goods, chattels, rights and credits which come into his possession, also with the proceeds of all real estate sold; he shall also account for the personal estate as the same shall have been appraised; he is not to profit by its increase, or suffer loss by its decrease or destruction without his fault; if he sells at less than the appraised value he is not responsible for the loss, if it shall appear to be beneficial to the estate to sell it; he is accountable for loss occasioned by his neglect or unreasonable delay; he is to render his account of his administration, within one year from the time of receiving his letters, and such further accounts of his administration from time to time as shall be required by the court until the whole estate shall be settled; and he may be examined on oath upon any matter relating to his account.—§§ 4481-9. Before his final account shall be allowed, notice must be given to all persons interested of the time and place of examining and allowing the same.—§ 4494.

How carefully the statute has attempted to guard the rights of the parties interested, will be seen from the provisions quoted and referred to. The executor or administrator is to make and return to the probate court an inventory of the deceased which comes to his possession or knowledge, or to the possession of any other person for him. This property is appraised by disinterested parties, and he is to account for it at this appraised value, with certain carefully guarded exceptions; he must collect debts due the deceased, and cannot compromise a claim without the approbation of the judge of probate. He has no personal interest in the estate, but holds it in a representative capacity. He cannot be a gainer therefrom, but may be a loser thereby. He is liable to be called to account from time to time. He

HATHAWAY v. WEEKS.

may be examined under oath touching his doings, and before his final account can be allowed, all persons interested must have notice.

There is thus a check and guard placed upon him at each step he takes, and this from the beginning. . He is bound to take at least ordinary care of the property and render a true account of his doings, under oath, so that the wishes of the testator may be carried out and the parties interested may not be defrauded.

But how different is the case of a residuary legatee. His bond is conditioned only to pay all the debts and legacies of the testator. Having given such a bond, he is not required to make or return any inventory; he is bound to account to no one; he takes the property of the deceased and becomes at once the absolute owner thereof. No checks or guards are provided to prevent the legatees from being defrauded, except the bond; upon this they rely. The residuary legatee may be active and vigilant in hunting up and discovering the property of the deceased, or he may be passive and indolent; and it concerns none of the legatees, nor can they call him to account therefor. He may promptly collect debts due the deceased and reduce the property to his possession, or he may compound with the creditor and give him a discharge upon such terms as to him shall seem best. He is obliged to consult with and please no one. Other distinctions might be referred to. The whole, however, may be summed up in a few words: The executor or administrator is a mere officer of the law; he has no personal interest in the property; his powers are all given him by law, and he is accountable for the due and proper execution of those powers: while the residuary legatee upon giving the bond becomes sole and absolute owner of the estate of the testator, both real, personal and mixed, with all the rights and remedies of an absolute owner, and subject to none of the conditions, restrictions or accountabilities of an executor. If, then, with such powers given him as residuary legatee, he could act in that capacity for

HATHEWAY v. WEEKS.

years, receive and enjoy the estate of the testator during that time, and then, when called upon to pay the legacies, refuse, and come in and ask to be released from the condition of his bond, and that the estate be administered in the usual form, we very much fear that the result to the legatees in most cases would be disastrous. It is not enough to say in answer that in this case the estate thus far has been honestly and economically administered, and that the parties interested are now in no worse position than they would have been had the estate been administered in the usual manner under the directions of the probate court from the beginning, or that a majority of the legatees acquiesce in these proceedings and the relief sought for. This may all be so in this case, and the same claim of honesty and economy would be made in every such case hereafter arising. If disputed, however, it is easy to see the difficulties that would arise after the lapse of one or more years, in proving that certain property might, with due diligence and perseverance, have been discovered; that claims compromised were not doubtful, or if they were, should not have been compromised upon such terms; that personal property was sold upon unfavorable terms and its full value not realized; that owing to delay the value of real estate has declined, or on account of its having been sold prematurely and without necessity therefor, it was needlessly sacrificed. Indeed, the questions, difficulties and dangers which might thus arise are unlimited in variety and extent. We think a court of equity should hesitate before opening the door to such abuses as would almost necessarily arise should the relief prayed for be granted.

There are still other reasons for leading us to the same conclusion. The residuary legatee was not obliged to give this bond. It was optional with him to give it or not. By giving it he obtained very decided advantages, which he could have acquired in no other way. He had ample time to investigate and determine whether he would give this bond or not. Until it was approved and accepted by the probate

HATHEWAY v. WEEKS.

court it was subject to his control. Having given it, he is bound by the conditions therein contained, viz.: "to pay all the debts and legacies of the testator;" not conditionally, in case there were found sufficient assets, but absolutely. The giving of the bond conclusively admits assets.—*Colwell v. Alger*, 5 Gray, 67. And in an action at law upon the bond it would be no defense to allege that there were no assets or that they were insufficient. The sufficiency of assets was one of the risks he assumed voluntarily, and from the consequences of such a risk equity does not relieve. It will not relieve from the legal consequences of an agreement thus deliberately entered into. The fact that in assuming the risk the party honestly supposed there would be sufficient assets, and therefore no risk to run, is no answer. It is seldom indeed that parties signing or giving official bonds or becoming security, do so under the belief that they are to become losers thereby. The fact that they, at the time of signing, honestly believe they thereby incur no risk, will not afterwards relieve them from liability. We have carefully considered all the reasons presented by the complainants for relief in this case, but for the reasons above stated, we think there was no error in the decree below sustaining the demurrer.

Complainants having been required to file a bond to enable them to obtain an injunction to stay the proceedings under the judgment, we see no objection to the court ordering and directing the payment of the amount of the judgment at or after the dissolution of the injunction.

The decree must be affirmed, with costs.

The other Justices concurred.

BURNHAM v. VAN GILDER.

Henry C. Burnham v. Clinton Van Gilder.

Trespass to lands: Rightful possession: Particular use. Trespass to lands will not lie against one rightly in possession, where the complaint is not of the retention of the land, but of the particular use to which it is put, which, however, is not out of the ordinary course of farming.

Practice: Certiorari: Judgment: Technical imperfections. The statute (Comp. L. 1871, § 5477) providing that on *certiorari* such judgment as the right of the matter requires shall be rendered, disregarding technical omissions, imperfections or defects that do not affect the merits, technical questions of practice will not be considered where the plaintiff's own testimony clearly negatives his right of action.

Submitted on briefs April 30. Decided June 13.

Error to Allegan Circuit.

Jacob V. Rogers, for plaintiff in error.

Stafford & Tomlinson, for defendant in error.

CAMPBELL, J:

This case comes up on *certiorari*, from a justice's court to the circuit court, removed here by writ of error. Van Gilder sued Burnham and arrested him on a *cupias* for a trespass to land. The trespass consisted, as alleged, in preparing and sowing several acres of land with wheat.

It appeared by Van Gilder's own testimony that he had purchased the land from one Harding while defendant was in possession, in July, 1874; that at that time defendant was rightly in possession and raising a crop of corn; that defendant and plaintiff had several conversations about putting in wheat, and Burnham said he intended to put it in, and Van Gilder objected, but never gave him notice to quit the premises, and does not swear that he had no right to remain; and shows expressly that he was acting in the ordinary course of farming upon lands in his undisturbed possession. The objection appears to have been to his particular use, and not to his retention of the land.

BURNHAM V. VAN GILDER.

Upon this state of facts the defendant was guilty of no trespass, and the plaintiff had no shadow of a right to bring this action.

As the statute requires this court on *certiorari* "to give judgment in the cause as the right of the matter may appear, without regarding technical omissions, imperfections, or defects in the proceedings before the justice, which did not affect the merits" (*C. L.*, § 5477), we shall not spend time in discussing the questions of practice raised on the record. Where a plaintiff's own testimony clearly negatives his right of action, it is not easy to see how he can get a judgment with or without the aid of technicalities; but if he can, such judgment is so manifestly against right that it should be set aside.

The judgment of the circuit court and of the justice's court must be reversed, with costs of all the courts, and judgment entered that the plaintiff take nothing by his suit.

The other Justices concurred.

**The Grover & Baker Sewing Machine Company v.
Jacob A. Polhemus and another.**

Agency: Authority: Credit: Ratification: Liability of principal. A principal is not holden for an indebtedness incurred in his name without authority by an agent, where he has never held the agent out as having such authority, or done any thing to ratify the unauthorized act; and much less where the credit was originally given to the agent and not to the principal.

Agency: Authority: Statements of agent. An agent can never invest himself with authority so as to bind his principal, by mere false statements to others with whom he deals as to the extent of his authority.

Agency: Credit: Horse keeping: Evidence: Liability of principal. Where an agent is furnished a horse by his principal, which he is himself to feed and take care of, the fact that the employment of the horse by the agent in the prosecution of the principal's business afforded a profit to

GROVER & BAKER SEWING MACHINE CO. v. POLHEMUS.

the latter, is nothing to the point as to his being liable to pay for the board and keeping of the horse, procured by the agent on credit without authority.

Submitted on briefs April 20. Decided June 13.

Error to Washtenaw Circuit.

Joslin & Whitman, for plaintiff in error.

Frazer & Hamilton, for defendants in error.

GRAVES, J:

The circuit court adjudged the plaintiff in error liable to defendants in error in a suit on the common counts for horse keeping and livery hire, and error is alleged.

The company, through their general agent, F. A. Van Buren, bargained with one Wissler to sell their sewing machines in Washtenaw county and vicinity, on the following understanding: they were to provide him a room in Ann Arbor, a horse and buggy and the machines, and he was to sell the machines and have thirty per cent. commission as compensation. The room and horse and buggy were provided, and machines as needed were supplied, and he prosecuted the business for some time under the arrangement. He called on defendants in error and contracted with them specially to board the horse, and they did so for several months and sometimes used the animal with his assent. He also got livery of them at various times. He informed them in the beginning that the company owned the horse. They charged the entire account for horse keeping and livery directly against him, and he paid them the larger portion of it. The recovery allowed against the company was for the balance of this entire account. As their witness, he swore that if he had paid it he would not have been entitled to ask the company to reimburse him. According to the record there was not the least ground for claiming that he had authority to get the horse boarded or obtain livery on the credit of the

GROVER & BAKER SEWING MACHINE CO. v. POLHEMUS.

company, or that the company held him out as having such power, or ever assumed in any form the liability therefor, or did any thing to make the liability their own. Moreover there would seem to have been no proper evidence that he contracted on company account, or any lawful evidence legitimately tending to show that defendants in error gave credit to any body except Wissler. Some evidence was admitted that when he called to get the horse boarded he stated it was for the company. But he could not invest himself with authority to bind the company by such statements. Were the rule otherwise, the fortune of every man would rest on the veracity of his errand boy. The arrangement made with him by the company gave him no such power, and his position did not imply it, and there was no evidence the company contributed in any manner to produce an impression that he possessed it. Besides, as before intimated, the evidence is not subject to be construed as showing that the dealings between him and defendants in error were had upon the faith of any power or intention to make the company a party to them.

On request of defendants in error the judge charged, among other things, that if the jury should find the defendant corporation derived benefit from the use of the horse and wagon in selling machines, then the corporation would be liable. This was clearly wrong. In the first place part of the entire claim was for livery hire and had no connection whatever with any benefit the company may have obtained from the use of their horse in the business of selling their machines; but, second, their responsibility for the board furnished to the horse at Wissler's instance in no way depended upon their being benefited by such use of the horse as may have occurred in selling machines. Wissler seems to have been a bailee of the horse subject to an obligation to take care of him, and the fact that his employment by the bailee may have produced profit to the bailor could not make the latter liable to defendants in error for the board of the horse they saw fit to provide at the bailee's request. In

GROVER & BAKER SEWING MACHINE CO. v. POLHEMUS.

short, if there was any ground whatever for fixing the company with a liability it must have been a very different one.

There are several other exceptions in the record, but some of them have no merit, and the others do not require notice now.

The judgment should be reversed, with costs, and a new trial ordered.

The other Justices concurred.

Drusilla Kinney v. John Kinney.

Wills: Construction: Widow: Allowances. A clause in a will giving to the testator's wife so much of his property, real and personal, as is allowed by law to widows in cases where no will is made, or in lieu of personal property allowed her by law, five hundred dollars to be taken by her in case she so elect in lieu of said personal property, is held not to be ambiguous, and it is construed so as to give effect to the apparent intent manifest in it. The "personal property allowed by law," to which the sum of five hundred dollars is made an alternative, refers to the specific property to the value of four hundred and fifty dollars which by law the widow is allowed to select.

Wills: Ambiguity: Evidence: Probable purposes. Where there is no ambiguity on the face of a will, it is not admissible by extrinsic evidence to seek to raise an ambiguity, and thereupon on the strength thereof to limit or qualify the construction of the language actually used so as to give effect to some conjectured probable purpose of the testator which he has failed to express. This would be not putting a construction upon the will made by him, but making a new one of quite a different purport.

Wills: Testator's circumstances: Intent: Construction. It is not permissible to deduce from the testator's circumstances an intent differing from that which he has plainly expressed in the will.

Wills: Testator's property: Construction: Intent. While it may perhaps properly be assumed generally that one making a will has a tolerably correct idea of the condition his estate would be left in if he were immediately taken away, it cannot be conclusively assumed that he anticipates his pecuniary circumstances are afterwards to remain unchanged, and makes his gifts in that expectation.

Wills: Change in circumstances: Intent. A will may be, and often is, made when death is not immediately contemplated, and may well make provisions with a view to possible contingencies of change of fortune, and in that view a provision for a small but certain legacy as the alternative to one probably large but possibly worthless, may be a proper dictate of kindness and generosity.

KINNEY v. KINNEY.

Wills: Construction: Intent: Language used. Judicial tribunals cannot inquire into a testator's hopes and expectations as to what his fortune may turn out to be when his will shall take effect, any further than he has seen fit to express them; where he has clearly expressed a wish consistent with the rules of law, they must give it effect; they are not at liberty to surmise that his real wishes were something different.

Heard April 30. Decided June 13.

Case made from St. Clair Circuit.

B. C. Farrand, C. R. Brown and O'B. J. Atkinson, for Drusilla Kinney.

Chadwick & Potter and Hoyt Post, for John Kinney.

COOLEY, CH. J:

The controversy in this case is upon the construction of one clause in the will of Arnold Kinney, which is as follows: "I give and bequeath to my wife Drusilla, if she shall survive me, so much of my property, both real and personal, as is allowed by law to widows in cases where no will is made, or in lieu of personal property allowed her by law, I give and bequeath to her five hundred dollars, to be taken by her in case she shall so elect, instead of the said personal property aforesaid." The widow elected to take what she would be allowed by law if there was no will.

The provision made by statute for the widow of an intestate is as follows:

1. An allowance for her support while the estate is in process of settlement.
2. Household furniture and other personal property to be selected by the widow, to the amount in all of four hundred and fifty dollars.
3. When the intestate leaves children, as was the case here, the widow, in addition to the provision already mentioned, takes one-third of the remaining personal estate after debts are paid.
4. The widow has her dower interest in the husband's real estate.

KINNEY v. KINNEY.

The paragraph of the will upon which the question arises is not expressed in ambiguous terms, and there can be no difficulty in giving effect to the apparent intent manifest in it. But it is claimed on behalf of the heirs that the apparent intent was not the real intent existing in the testator's mind when the will was made. To prove this, resort has not been had to direct testimony, but the condition of the estate is proved, and it is said there springs from this an inference amounting to practical demonstration, that the intention of the testator was not what the language he has employed would indicate.

The fact on which reliance is chiefly placed is, that the personal property of the testator amounted at the time the will was made to twenty-five thousand dollars. The widow, if entitled to one-third of this, would receive something like eight thousand dollars, besides the temporary provision for support, and the four hundred and fifty dollars in specific chattels selected by her. To give her the alternative of selecting between eight thousand dollars and five hundred dollars would be an absurdity of which it is supposed no reasonable man would be guilty, and it is said we must assume that something different was intended. If we are at liberty to infer that by the "personal property allowed her by law" the testator intended only the specific property to the value of four hundred and fifty dollars, which the widow is allowed to select, the difficulty will disappear. Five hundred dollars in cash as the alternative to specific property of the value of four hundred and fifty dollars would afford a choice that might reasonably be presented to any one; and it may fairly be considered a sensible deduction from all the circumstances, when these are brought into the case by proofs, that it was this reasonable alternative which it was the purpose of the testator to present, rather than one manifestly absurd from the great diversity in value of the two things between which the choice was to be made.

But this method of ascertaining the testator's intent takes us away from a consideration of his language, in which he

KINNEY v. KINNEY.

must be supposed to have carefully expressed his wishes, and invites us to conjecture what probable purpose he had in view which he has failed to express. Whatever may be the probabilities that we shall thereby reach the testator's real intent, it is manifest that this method is not putting a construction upon the will made by him, but it is making a new one of quite a different purport.

There are cases in which, when a man's will is examined in the light afforded by his property and by a knowledge of the persons who were or who may have been the objects of his bounty, some ambiguity may appear which can only be solved by a resort to parol evidence in aid of the construction. Language may be employed which seems to point with more or less directness to two different persons as the intended beneficiary, or a description of property may seem to fit one parcel as well as another. In such cases the testator must be supposed to have had only one of the persons or one of the parcels of property in mind in making the intended gift. And it is always admissible to ascertain which of the two he intended to indicate, by a resort to any evidence which will give us an insight into his purpose. When an ambiguity is not found in the will itself, but is made to appear by extrinsic evidence, a resort to other evidence of a similar character, in order to solve the difficulty, is only pushing a little farther the inquiry by which the existence of an apparent uncertainty has been disclosed. Such ambiguities often appear when the will has been expressed with great care and caution; the difficulty arising from the fact that a name or description of one person or thing, however clearly given in the will, and with a single person or thing only in mind, may be found capable of being applied to others. There is no reason for defeating a gift by will for such an ambiguity that would not apply with equal force to a deed or a bill of sale. Indeed, parol evidence is usually necessary to apply any gift or sale to the person or thing intended.

The circuit judge may have supposed this to be a case

KINNEY v. KINNEY.

of latent ambiguity; that is, he may have supposed, though the intent appeared to be plain on the face of the will, yet that when it was shown how much property the testator had, it became doubtful whether he intended to give his wife *all* the personal property that would have been allowed her as the widow of an intestate, or only *so much* thereof as would be set off to her in specific chattels of her selection. But this view overlooks the fact that, in order to create any ambiguity at all, it is necessary to modify or overrule the language of the will. The will is no more ambiguous when the extrinsic facts are proved than it was before. In clear and unmistakable language it declares the testator's purpose that his wife shall have "so much" of his property, both real and personal, as is allowed by law to the widows of intestates, with liberty to choose between the personal property and five hundred dollars in money. The words are perfectly clear, and in their meaning are wholly independent of and unaffected by the extrinsic evidence. They give "so much" as the statute sets apart for the widow of an intestate, whether that be much or little, and not some particular portion thereof.

It was said by *Lord Kenyon* in *Hay v. Coventry*, 3 T. R., 83, 85, that "the general rule which is laid down in the books, and on which alone courts can with any safety proceed in the decision of questions of this kind, is to collect the testator's intention from the words which he has used in his will, and not from conjecture." Similar language is found in the following, among other cases: *Stephenson v. Heathcote*, 1 Eden, 38, approved in *Boot v. Blundell*, 19 Ves., 494, 521; *Miller v. Travers*, 8 Bing., 244; *Hardwicke v. Douglas*, 7 Cl. & Fin., 815; *Jackson v. Sill*, 11 Johns., 201. The controversy in *Hensman v. Fryer*, Law Rep., 3 Ch. App., 420, was upon circumstances very similar to those in the present case, and *Lord Chelmsford* denied the right to deduce from the testator's circumstances an intent differing from that which was plainly expressed in the will. But even if we were at liberty to act

KINNEY v. KINNEY.

upon conjecture, the little knowledge we have of the facts would afford no reasonable basis for doing so. The facts relied upon are, that the testator, having some twenty-five thousand dollars of personal property, gives his wife the option to take one-third of it, or the sum of five hundred dollars, which is said to be too absurd to have been really intended. This argument must assume two things:

1. That the testator had an accurate knowledge of the condition of his estate; and
2. That he did not contemplate as probable, or even possible, any considerable change in his circumstances up to the time of his death.

That one making a will has a tolerably correct idea of the condition his estate would be left in if he were immediately taken away, may perhaps be generally assumed, though the assumption would often be wide of the mark. But it cannot be taken for a general rule that persons performing this important act anticipate that their pecuniary circumstances are afterwards to remain unchanged, and that they make their gifts in that expectation.

A will, though often made while death is contemplated as a remote event, is to speak from the time the death takes place. The will made by a rich man may therefore take effect only after he has died poor. If he was reasonably thoughtful and prudent in making it, it will probably be found that he made provision, while giving away what then promised to be a large fortune, for the possibility that the distribution would be of the mere wreck of a fortune only. In such a case a gift that when made seemed princely may dwindle into insignificance; and a provision for a small but certain legacy as the alternative to one probably large but possibly worthless, may be a proper dictate of kindness and generosity.

A court can never know that a testator may not have contemplated such a possibility when making a testamentary disposition of his property. The probabilities rather favor such a view; for the instrument is not to have immediate

KINNEY v. KINNEY.

effect, and may remain inoperative for many years. But into the testator's hopes or expectations on this score judicial tribunals cannot inquire any farther than he has seen fit to express them. Where he has clearly expressed a wish, consistent with the rules of law, they must give it effect; they are not at liberty to surmise that his real wishes were something different.

In our opinion the conclusion of the probate judge was correct, and it must be affirmed, and that of the circuit court reversed, with costs of that court and this. The order affirming that of the probate court will be remitted to both the lower courts.

The other Justices concurred.

Michael Dunn v. Francis Gilman, Jr.

Search warrant: Officer: Protection: Official acts. An officer in executing a search warrant fair on its face, and issued by a court having jurisdiction over the subject matter, is not liable for his official acts in following in good faith the command of his writ and the official directions of the court, though it should be made clearly to appear that the property seized had not in fact been stolen, and that the party suing out the writ was not entitled to its possession.

Officer: Process: Penalty for not serving: Liability for serving. An officer who is made liable by statute to a penalty if he refuses to execute a writ, cannot be held liable for serving the writ in good faith where the process is valid on its face and issued by the proper authority.

Search warrant: Custody of law: Officer. The property, during the time it is in the officer's possession under and by virtue of a valid search warrant, is to be considered as in the custody of the law, although the proceeding based on such writ touching the question of ownership be not conclusive; and an owner claiming that his rights have been interfered with by such proceedings must seek his remedy against some other person than such officer.

Submitted on briefs April 20. Decided June 13.

Error to Wayne Circuit.

DUNN v. GILMAN.

Prentiss & Fox, for plaintiff in error, as to the protection afforded the officer by a writ fair on its face, cited: *C. L.* 1871, §§ 7680, 8000, 8003; *Dwinnels v. Boynton*, 3 *Allen*, 310; *Savacool v. Boughton*, 5 *Wend.*, 171; *Beatty v. Perkins*, 6 *Ib.*, 385; *Ortman v. Greenman*, 4 *Mich.*, 293; *People v. Rix*, 6 *Ib.*, 144; *Shipman v. Clark*, 4 *Denio*, 446; *Hallet v. Byrt*, *Carthews*, 380; *Foster v. Pettibone*, 20 *Barb.*, 350; *Cook v. Hopper*, 23 *Mich.*, 511.

Henry M. Cheever, for defendant in error.

MARSTON, J:

Gilman brought an action of trespass on the case against Dunn for taking and converting a certain bay mare. Defendant pleaded the general issue, with a notice of justification.

Upon the trial it appeared that Gilman claimed title to the property through one Jacobs. Jacobs admitted having made some sort of a conditional agreement to sell to Gilman's vendor, but that the agreement had not been consummated. It also appeared that afterwards, and on the 18th of January, 1875, Jacobs appeared before a justice of the peace and made complaint that the property in question had been stolen from him, and that he had reason to believe it was then concealed about the premises of one Bondie and Gilman, and he prayed that a search warrant might issue. A search warrant was issued by the justice and delivered to Dunn, who was then a constable. On the same day he made return thereon that he had searched and found the property upon the premises as described in the writ, and had the same then before the court as he was therein commanded. It also appeared that the justice thereupon proceeded to examine witnesses, and as appeared from the entry in his docket, he was of opinion from the evidence in the case that the property belonged to Jacobs; that it had been stolen by some person unknown, and concealed upon the premises described in the warrant;

DUNN V. GILMAN.

and he thereupon ordered and directed the officer to restore the property to the complainant Jacobs. Gilman was present during the proceedings before the justice upon the return being made, but took no part therein. These facts appearing upon the trial, and not being disputed, as to the judicial proceedings, Dunn claimed that he was not liable.

It is not necessary to set forth the complaint and warrant, as no question was made as to their sufficiency, either in form or substance, nor was the regularity or validity of the proceedings thereunder before the justice questioned, so that we have no occasion to consider them.

Defendant Dunn, in searching for the property, seizing and taking it before the justice, was acting ministerially under a writ valid upon its face and issued by a court having jurisdiction over the subject matter. It was his duty upon the receipt of this writ to proceed at once, and without questioning its validity, to search for, take and hold this identical property. Had he refused so to do he would by so doing have rendered himself liable to a penalty.—2 *Comp. Laws*, § 7680. Having seized the property in obedience to the command of his writ, it became his duty to safely keep the same, under the direction of the court, to be used as evidence on any trial, and the statute further directs that as soon as may be afterwards such property shall be restored to the owner thereof.—§ 8003. The justice evidently endeavored to follow the provisions of the statute, and neither his jurisdiction nor the regularity or validity of his proceedings have been questioned. Dunn seems to have acted throughout officially, and to have followed in all respects in good faith the instructions given him in his writ and the official order of the justice made during the progress of the case. He cannot, therefore, be held liable in this action under such circumstances, although it should in this case be made clearly to appear that the property had not been stolen, that the complainant was not entitled to its possession, but that the owner of the premises where it was found was in truth and fact the owner of the property.

DUNN v. GILMAN.

The officer cannot be held liable if he refuses to execute the writ, and at the same time be held liable in case he does. This would be placing the officer in a very embarrassing position, to thus hold him liable in either event, and there would be neither justice nor common sense in so doing. The property, during the entire time it was in the officer's possession, was in the custody of the law, and although the proceedings before the justice may not have been conclusive, touching the question of ownership, yet if the owner claims that his rights have been interfered with, he must seek his remedy against some other person.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

Susan E. Kimberly v. Fanny Guilford.

Contracts: Party in interest: Private agreements: Estoppel. Where K and S have both had conversations with G whereby an oral arrangement was made for the use of a banking ground, and there was nothing in any of the negotiations to indicate that any one but K was the party in interest, K, when sued for the price of such use, will not be at liberty to defend on a showing that by a private agreement between him and S, the latter was to bank and move K's logs, and was bound to furnish the banking ground himself.

Appropriating property of another: Promise to pay: Defense: Previous appropriations of defendant's property by plaintiff. In an action for the value of logs belonging to plaintiff which defendant had taken and sawed and afterwards agreed to pay for, the defendant was held not at liberty under the circumstances of this case to justify his taking by a showing that certain other logs which had previously been mutually agreed on as plaintiff's logs,—each having by mistake cut over the line and upon the other's land,—and which plaintiff thereupon had taken and run down the stream, were in fact defendant's logs, no such claim having been made at the time of the taking or the promise to pay for the logs in suit, and no offer having been made to reimburse plaintiff for the expense of running the logs now claimed by defendant.

Submitted on briefs June 7. Decided June 13.

Error to Saginaw Circuit.

KIMBERLY v. GUILFORD.

D. W. Perkins, for plaintiff in error.

Albert Trask, for defendant in error.

CAMPBELL, J:

Mrs. Guilford, the defendant in error, recovered judgment against Charles S. Kimberly, plaintiff in error's intestate, for a demand consisting of two items: *first*, the use of her land by Kimberly for banking logs; and *second*, the value of her logs used by Kimberly, which he agreed to pay for.

The plaintiff below proved an agreement with Kimberly to let him have the use of the banking ground, and upon the question whether the use was to be gratuitous or not, the jury found in her favor on the conflicting evidence. But it is claimed that the court below improperly shut out evidence which might have proved that the party really bound to furnish the use of a banking ground was one Smith, who was to bank and move Kimberly's logs.

The evidence of the defendant, as well as that of plaintiff, showed that Kimberly and Smith both had conversations with Mr. Guilford (who made the arrangement), in regard to banking the logs, and that those conversations were such as in no way to indicate to him that any one but Kimberly was the party in interest. The court below was right, therefore, in holding that under such circumstances it was not material what private agreements existed between Kimberly and Smith. Both of them were fully examined as to their conversations with Guilford, and there was no claim that he was informed of any such arrangement.

Upon the other branch of the case, on which the testimony was in conflict, there was some evidence tending to show not only that Kimberly cut some logs on Mrs. Guilford's land, but that she cut some on his. This was all the result of a slight mistake of a surveyor. The court instructed the jury that there could be no recovery by Mrs. Guilford for any of her logs in this action of assumpsit

KIMBERLY v. GUILFORD.

unless Kimberly had expressly promised to pay for them. As the case was put to the jury, they must have found that there was such a direct promise for all the logs on which they found in her favor. It was claimed by Kimberly that some logs which both supposed to have been cut on her land were mutually agreed on as her logs, and she ran them down the stream to her own place of destination, but that some of these were in fact logs from his land, both parties being under a mistake. Kimberly took several logs from Mrs. Guilford's logs, and sawed them up into lumber, and when informed that they were hers, he agreed to pay for them.

On the trial of the cause before the justice no defense was put in, and no evidence was given at the circuit to show that Kimberly had ever before claimed that Mrs. Guilford had ever had any of his logs, or that he had taken the logs in question on such a claim to make good the mistake. The court held that if such a mistake had arisen, and he had consented to her putting her marks on those logs, and to their being mixed in the stream with other logs so as to destroy their identity, she could retain them, and he could not take out a corresponding amount of logs not identified as his, in their place, but would only be entitled to recover their value from her.

By means of this arrangement, if made, the plaintiff below was induced to incur for all those logs the expenses of running and management, and if there would have been any equity in allowing a selection by Kimberly of an equivalent amount, it could only be on repayment of such expenses. She was in no sense at fault if there was such a mistake made. He is not shown to have made any selection under such a claim, but he sawed up the logs bearing her mark which he took away, under a mistake as to their ownership, which he afterwards recognized to be in her, and promised to pay for. This being so, and he not having claimed them as an equivalent for others, or offered to pay the running expenses, they cannot be regarded as his logs,

KIMBERLY v. GUILFORD.

and the court was right in its rulings. It is not necessary to consider the somewhat vexed question, what right of selection would otherwise have existed in a confusion of logs created in the manner referred to.

The judgment must be affirmed, with costs.

The other Justices concurred.

Ephraim B. Town v. Lester A. Tabor.

Replevin: Defense: Attachment proceedings: Contract rights. In an action of replevin against a constable to recover property he had seized upon an attachment against a third person, the exclusion of a defense based upon contract rights to the property in the plaintiff in attachment, is held not error where no such rights were set up when the demand was made before the replevin suit was brought, and it does not fairly appear that the officer was instructed to hold on the footing of such rights, and where the contract set up gave the right of possession to another.

Attachment: Modes of service: Statute construed. The statute as to service of writs of attachment from justice's courts contemplates personal service if defendant can be found in the county, and if not, then, as the next best mode, the leaving of certified copies at his last place of residence in the county, and finally, as a last alternative, service upon the person found in possession of the property; and the officer is bound to use diligence to secure the best service, and may not adopt an inferior one until, after reasonable diligence running through the time given for it, all superior modes are found impracticable.

Attachment: Return of service Personal service: Service by copy: Service on agent. And when the constable's return shows that the only service made was by leaving the papers with the person found in possession of the property, and that such service was made at a time when there was still another day left within which the personal service, or service by leaving a copy at the last place of residence, etc., was available, the justice acquires no jurisdiction to proceed with the case.

Attachment: Service: Return: Amendment: Offer. And an offer to amend such return by parol evidence that the writ was not in fact handed back into the justice's office by the constable until its return day, and that in the interval between such service as he did make and the return day he was unable to find the defendant, if competent, does not go far enough to cure the defect, in the absence of any proposal to show also that he acted under the writ in the meantime, and sought and was unable to find the defendant or his last place of residence in the county.

Service: Return. In all cases the return of service should inform the court that lawful service has been made.

TOWN v. TABOR.

Res inter alios. It is not for a defendant in replevin to object that the plaintiff acquired title from a third person through an abuse of confidential relations, so long as the person said to be thus defrauded is satisfied and makes no complaint.

Attorneys: Dealings with client. There is no law in this state to prevent an attorney from buying a chattel of one person and then suing another in replevin to obtain possession of it.

Heard June 7. Decided June 18.

Error to Van Buren Circuit.

George W. Lawton, for plaintiff in error.

L. A. Tabor, in person, *Richards & Mills* and *N. Foster*, for defendant in error.

GRAVES, J:

Tabor sued in replevin for an organ that Town held and refused to deliver to him.

The action was tried in October, 1875. Tabor gave evidence that he bought the organ of Martin Carmen and his daughter Lizzie Carmen on March 9, 1874, and received a bill of sale therefor. This bill of sale was given in evidence, but is not in the record.

At this time Tabor was an attorney, and had previously acted as such for the Carmens in regard to a claim made against the organ by Kinney, Adams & Co., under color of attachment proceedings before a justice, against Martin Carmen. Town was constable, and he sought to justify his holding against Tabor, *first*, under a levy made by him of an execution, March 12, 1875, in the attachment case against Martin Carmen; and *second*, on a right to the organ claimed by Kinney, Adams & Co. in virtue of an assignment to them on March 4, 1874, of a written contract for the sale of the organ to Martin Carmen by Blakeman & Phillips, the assignment being by Phillips, but covering the interest of both Blakeman and Phillips.

The court ruled out the attachment proceedings as void, and refused the defense set up under the assignment of the contract, and ordered a verdict for Tabor.

TOWN v. TABOR.

When Tabor made demand, Town claimed, as plainly appears from his own testimony as well as from the other evidence, to hold only under the levy, and made no pretense of holding under any right of Kinney, Adams & Co. in virtue of the assigned contract, and indeed the evidence does not fairly tend to show that he was instructed by Kinney, Adams & Co. to hold on the footing of that contract, and there is no evidence that Carmen or Tabor was advised at that time that Kinney, Adams & Co. had obtained an assignment of the old contract and meant to maintain Town's possession on the strength of it. There is a further difficulty. The contract in question gave Carmen the right of possession, and there was no proof of facts to show this right of possession had been cut off. Carmen had given his note, and this seems to have been outstanding and not returned, and Kinney, Adams & Co. had done nothing to get possession or complete their right to it under the terms of the contract. It is not worth while to consider this part of the case further. There was no error in excluding this ground of defense.

Were the attachment proceedings invalid on jurisdictional grounds? We think they were. The attachment was issued on the 26th of January, 1874, and was made returnable on the 2d of February thereafter. It was not served personally, but only by seizure of the organ and service of papers on a third person found in possession. There was no appearance by the defendant, and this is explicitly stated in the record made by the justice. The law gave the officer for service all except the last six days, and Town's certificate as constable shows that he seized the organ and made service on the person in possession on the very day the writ was issued. In short, the manifest sense of his return is, that whatever he did in effecting service was done on the first day. After the proceedings had been objected to and ruled out, he offered to show by the oath of the justice that in fact the writ of attachment was handed back into the justice's office on the 2d of February, and he offered to testify

TOWN v. TABOR.

himself to the same fact, and further that during the interval in which the writ was in his hands he could not find the defendant named in it. The offer was refused. He did not propose to show by the justice that he acted under or proceeded on the writ in any way after the day it was issued, nor did he propose to swear that he did any thing in order to execute the writ after that day, unless we are to infer, from his offer to swear that he could not find defendant, that he looked after him. Neither offer implied any purpose to show a search after January 26th for a last place of residence of the defendant in the county.

Granting, but not deciding, that it was competent to make parol proof of such facts as were suggested, and supposing them proved, and still the action of Town in executing the writ is left where his certificate left it, except in so far as the statement that he could not find the defendant may be supposed to change it. The fact that he delivered the writ to the justice on the second of February is not decisive. The question is, what he did under the writ, and when he did it. And viewing his certificate, and considering the facts proposed to be shown as though they had been proved, and we still find that the service made was on the day the writ issued, and when there was at least another day within which to make personal service, or service by copy left at defendant's residence. We also find that on this very day on which the writ issued, service was made in a mode which is only permissible in case the officer by the use of reasonable diligence during the time allowed him is unable to make personal service, and is also unable by such diligence to serve by copy at the last residence of the defendant in the county.

As the merits of the substantial point raised were not affected by the exclusion of the evidence offered, I do not propose to discuss the exception taken to the exclusion. The vital question, and which has been hinted at already, comes up in any view upon the certificate.

Coming back then to the return itself, we think it showed that the process was defectively executed. Upon

TOWN v. TABOR.

any reasonable construction of the statute it was needful to employ at least one day more in order to make personal service, or in case of failure on account of defendant's absence from the county, then to serve by leaving certified copies of the papers at defendant's last place of residence. The law contemplates that the officer shall serve personally, if he can find the defendant in the county. But if he cannot find him, then, as the next best mode, to leave certified copies of the papers at his last place of residence in the county; and finally, as a last alternative, and as the least satisfactory mode, and which is only permitted in case the other modes are found after reasonable diligence to be impracticable, to leave the papers with the person found in possession of the property to be bound by the writ. Within the time allowed him the officer is required to use reasonable diligence to secure the best service, and the alternative modes are provided for in the order of their goodness. An inferior mode is not to be adopted unless, after reasonable diligence running through the time given for it, the superior one appears impracticable.

The time given to make the best attainable service is given by the law, and it is essential that the officer take it before he assumes to conclude by service in the second or third way. When he does not take the time given, and immediately winds up his doings in the way of service by leaving copies, the law regulating the course in regard to service is violated, and the court may not say that no better service would have been attainable if the command of the law had been observed. In such case the specific service made is not shown to the court to be authorized at all, is not proved to be the kind of service adapted to the exigency, because the means which the law has provided for the showing do not show it. In all cases the return should inform the justice that lawful service has been made. The return here distinctly shows that the officer abridged the time, and hence does not prove, either expressly or presumptively, that the right to serve by leaving copies with the person in posses-

TOWN v. TABOR.

sion had arisen. No service by leaving copies with the person found in possession can be valid unless the officer by reasonable diligence within the time allowed him is unable to make service in one or the other of the preceding modes, and inability to serve in these modes, during the whole time given to serve, should appear in order to show the third mode of service to be warranted at all. If the contrary is apparent, the service is shown to be bad.

The argument against the validity of Tabor's title on account of his being an attorney, and his relation to the controversy, does not appear to the court to be sound. The Carmens, so far as appears, are quite satisfied with him and his measures, and it is not for Town to attempt to repel Tabor's effort to get possession, by claiming that he defrauded or overreached the Carmens in getting from them the right on which he has based his suit; and the statutes referred to, which forbid certain dealings by attorneys in the way of getting demands with intent to prosecute them for the purpose of profit, have no application. There is no law in this state to prevent an attorney from buying a chattel of one person, and then suing another in replevin to get possession of it.

There were some items of evidence concerning talk about a compromise of the attachment suit, and the judge alluded to it. Objection is made to what he said. The point has nothing in it. The evidence did not tend to show any compromise. On the contrary, the facts show that Kinney, Adams & Co. did not suppose there was any, and acted accordingly. They proceeded to judgment and caused execution to issue. If the organ had become theirs by compromise, the taking on execution was absurd. At the most there was some talk about settlement, which came to nothing, as the case shows.

On the whole, we discover no ground for disturbing the judgment, and it must be affirmed, with costs.

The other Justices concurred.

WILCOX v. ISMON.

James L. Wilcox and others v. Henry Ismon and another.

Affidavit for capias: Conversion. An affidavit for a *capias ad respondendum* which charges clearly enough an unlawful conversion of the property of the plaintiffs, is held sufficient.

Appearance bail: Officer making the arrest: Under sheriff: Obligees. Under the statute (*Comp. L. 1871, § 5738*) requiring bail bonds for appearance to be executed to the officer making the arrest, a bond running to the under sheriff, when that officer made the arrest, is not thereby rendered invalid.

Bail pieces: Waiver: Bond. The failure to give bail pieces to the sureties on a bail bond, where they have waived their rights in the matter by not demanding them, will not prejudice the plaintiff in the action, nor invalidate the bond.

Bail bonds: Assignment: Seal. An assignment of a bail bond need not be under seal, in the absence of such a statutory requirement.

Bail bonds: Assignment: Official character. Such an assignment need not be made in the official character of the officer to whom the bond ran, the official character appearing in the bond itself; any assignment purporting to transfer the bond is sufficient.

Appearance bail: Acceptance of plea: Waiver. The acceptance of a plea, and proceeding in the suit, is not a waiver of the right to proceed against the appearance bail.

Bail bonds: Measure of damages: Judgment. In an action on a bail bond the judgment in the original suit is admissible in evidence, as fixing the measure of damages.

Appearance bail: Sureties: Failure to put in special bail. Sureties on appearance bail become liable on failure to put in special bail to the same extent that sureties on special bail would if special bail had been put in.

Appearance bail: Neglect to proceed against the sheriff: Option. Neglect on the part of the plaintiff to proceed against the sheriff or his bail, does not discharge the appearance bail, the plaintiff having the option to proceed against the sheriff or to take an assignment of the bond for appearance.

Heard June 7. Decided June 13.

Error to Van Buren Circuit.

George W. Lawton and Richards & Mills, for plaintiffs in error.

C. L. Fitch, for defendants in error.

COOLEY, CH. J:

The plaintiffs in error were sureties on the bail bond of

WILCOX v. ISMON.

James A. McKibbin, who had been arrested at the suit of defendants in error on a *capias* issued in an action of trespass on the case. The arrest appears to have been made by Noble D. Richardson, under sheriff of Van Buren county, and the bond was given to him by that designation, without mentioning the sheriff. McKibbin failed to put in special bail as required by his undertaking, and Richardson assigned the bail bond to the plaintiffs, who brought this suit. Previous to doing so, however, an issue had been formed in the original action, and the case had proceeded to a judgment in their favor.

I. It is objected that the affidavit on which the order of arrest was made was insufficient. The affidavit was as follows:

“STATE OF MICHIGAN, }
Van Buren County, } ss.

“Henry Ismon, of the village of Paw Paw, in said county and state, being duly sworn, deposes and says that he is in copartnership with Horace S. Ismon, of the county of Jackson and state of Michigan, with whom he is engaged in business at the village, county and state first aforesaid, under the firm name and style of H. & H. S. Ismon; that he makes this affidavit as well in behalf of said Horace S. Ismon as of this deponent, and that he is personally acquainted with and cognizant of the facts stated and set forth in this affidavit.

“And this deponent further saith, that on the 14th day of May, A. D. 1872, said H. & H. S. Ismon, and one James McKibbin, purchased a certain horse known as Night Hawk, Jr., and one skeleton wagon, for the sum of six hundred dollars, of which said McKibbin paid one-half and said firm paid the remaining one half, by which said purchase said firm and said McKibbin became the owners of said property in undivided moieties.

“And this deponent further saith that on or about the 5th day of November, 1872, the said McKibbin took said property into his possession, and agreed with said firm that

WILCOX v. ISMON.

he would pay the keeping of said horse for the use of the same.

"And this deponent further saith that on or about the 8th day of July, A. D. 1873, this deponent, in conversation with said McKibbin, asked him, said McKibbin, to put said horse into the hands of some competent person to be fitted for trotting, and that said James McKibbin told this deponent to go to hell.

"And this deponent further saith that on or about said 8th day of July, 1873, with the intent to defraud said firm of H. & H. S. Ismon, said James McKibbin secretly disposed of said property, and now refuses to account or to pay said firm for their interest therein.

"And this deponent further saith that in a conversation with said McKibbin on the 11th day of July, A. D. 1873, said McKibbin told this deponent that said property was gone, and that this deponent might whistle for his interest therein, for he could never have a cent for the same.

"And this deponent further saith that said firm of H. & H. S. Ismon, at the time said property was as aforesaid disposed of by said McKibbin, owned an undivided one-half interest therein, and that the value of said undivided one-half was five hundred dollars.

"And this deponent further saith that he verily believes that, upon the aforesaid facts, said Henry Ismon and Horace S. Ismon have a good cause of action against said James McKibbin in an action of trespass on the case, and claim damage in the sum of five hundred dollars.

"(signed)

HENRY ISMON.

"Sworn and subscribed to before me this 14th day of August, A. D. 1873.

"SAMUEL HOLMES,

"Notary Public."

We discover no difficulty with this affidavit. It shows a clear case of unlawful conversion of the property of the plaintiffs, and the criticism made upon it does not reach its substance.

WILCOX v. ISMON.

II. It is argued that the bail bond is invalid because taken to the under sheriff instead of the sheriff. The statute (*Comp. L. 1871, § 5738*) requires it to be executed to the officer making the arrest. This undoubtedly means the sheriff when the arrest is made by him or by one of his officers; for in contemplation of law whatever is done by them is done by him. — *Watson on Sheriffs, 31-2; Cameron v. Reynolds, Cowp., 403; Simonds v. Catlin, 2 Caines, 61*. We are not satisfied, however, that a bail bond taken to the under sheriff is invalid for the informality. The bond to the sheriff's officer may well be treated as a bond to the sheriff himself; it is to the office rather than to the individual. But in this case it is not shown that there was any sheriff; and if there was not, the under sheriff by law was vested with the powers of the sheriff, and entitled to do all official acts in his own name.—*Comp. L., § 554*.

III. It was shown that when the bail bond was given no bail pieces were delivered to the sureties as required by the statute; and this, it is urged, invalidated the obligation. We think not. The sureties had a clear right to them.—*Comp. L. 1871, § 5739*. But we think they might waive the right, and that they do waive it when they do not call for them. Had they requested them, it is to be presumed they would have received them; and if not delivered at the time, the delivery might have been compelled afterward on demand. But when they deliver the bond without requiring the bail pieces which the statute contemplates shall be delivered simultaneously, the plaintiff, we think, is not concerned with the omission, and is not to be prejudiced by it.

IV. The assignment of the bond is objected to, not only because made by the under sheriff, but also because not under seal, and not purporting to be an official act. The statute now in force (*Comp. L. 1871, § 5754*) does not require it to be under seal, as some earlier statutes did, and the seal was therefore not essential. Nor do we think the assignment need purport to be an official act, the official character appearing in the bond itself, upon which the assign-

WILCOX v. ISMON.

ment was endorsed. Any endorsement by the officer purporting to transfer the bond to the plaintiffs would be sufficient; he holds the bond for his protection as an individual, and transfers it to the plaintiffs that they themselves may assume the responsibility.

V. The point is made that plaintiffs, by accepting a plea and proceeding in the suit, waived their right to proceed against the appearance bail. This point was referred to in *De Myer v. McGonagal*, 32 Mich., 120, and what is there said indicates our views against it. There seems to be no necessity for considering it further.

VI. The defendants objected to the judgment in the original suit being given in evidence against them. But this was the proper method to show the damages the plaintiffs had sustained. The bail had become responsible for the defendant's appearance and for his putting in special bail. If he failed in this, the sureties were responsible to the same extent that the special bail would have been, had any been entered. It is also claimed that the sureties were discharged by the neglect to move against the sheriff or his bail. But we think there is nothing in this. The plaintiffs had their option to proceed against the sheriff or to take an assignment of the bond. They chose the latter course. There was no delay that the statute permits these parties to take advantage of, nor was there any that operated to their prejudice.

The judgment appears to be correct, and it is affirmed, with costs.

The other Justices concurred.

 JONES v. WATER COMMISSIONERS OF DETROIT.

J. Huff Jones and others v. The Board of Water Commissioners of Detroit.

Water rates: Taxes: Lien: Use of water. Water rates paid by consumers, under the statute incorporating the water commissioners of Detroit, are in no sense taxes, and the lien, though enforced in the same way as a lien for taxes, by sale of the premises, is really a lien for an indebtedness, like that enforced on mechanics' contracts, or against ships and vessels; they are but the price paid for water as a commodity, and the use of the water is not compulsory.

Taxation: Water pipes: General tax: Local assessment. The taxes provided for by the act of 1869, against vacant lots in front of which water pipes are laid, not being devoted by the statute to any specific purpose, must go, if valid, into the general fund; and not being applied by the statute to expenses or constructions on the street, or in any district within which they are raised, nor proportioned in any way to the cost of the improvement, they cannot come within the class of local assessments.

Assessments: General tax: Specific tax. The purposes of this assessment being general, it is to be regarded as a tax in the most general sense, and subject to the rules of law governing taxes. It is not in any sense a specific tax.

Uniformity in taxation: Cash value: Frontage. The constitutional requirement of uniformity in taxation, according to the cash value of the property, applies to such assessments; and an assessment upon a specified class of lots only, laid upon their frontage on the street, is beyond the power of the legislature to authorize.

Heard June 7. Decided June 13.

Appeal in Chancery from Superior Court of Detroit.

Baker & Thompson and C. A. Kent, for complainants.

Theodore Romeyn, for defendants.

CAMPBELL, J:

The only question presented by the record in this case is whether assessments made by the water commissioners of Detroit against property not using water are valid.

The defendant is a corporation auxiliary to the city of Detroit, and in charge of its water works. By the original act of incorporation the water commissioners were empowered from time to time to "cause to be assessed the water

JONES V. WATER COMMISSIONERS OF DETROIT.

rate to be paid by the owner or occupant of each house or other building having or using water, upon such basis as they shall deem equitable; and such water rate shall become a continuing lien, until paid, upon such house or other building, and upon the lot or lots upon which such house or other building is situated."—*Act of February 14, 1853, Sec. 10*. This claim could be enforced by shutting off the water or by collection proceedings, as well as by a sale in the form and with the incidents of a city tax sale.

On the 5th of April, 1869, an amendatory act of the legislature authorized and required the commissioners to "assess upon each and every lot in the city of Detroit, in front of which water pipes are laid, an annual tax or assessment of three cents per lineal foot of the frontage of such lot or lots, and which do not pay water rates, which shall be a lien upon such lot or lots, and may be collected from the owner or owners of such lot or lots, or by sale thereof in the same manner as is provided by sections nine and ten in reference to water rates: *Provided*, That no such lot or lots shall be so taxed on more than one front; and where such pipes are laid across more than one front of any lot, only the shortest front shall be estimated in making such assessment."

Under this statute, and corresponding by-laws, taxes were levied on the lands of complainants, which were advertised for sale, and the sale was enjoined by the superior court of Detroit. An appeal is brought from that action.

It is claimed that these taxes are invalid, and the law under which they were levied unconstitutional.

In order to understand the precise condition of this subject, it is necessary to examine somewhat into the legislation.

The principal expense of building and enlarging the water works has always been laid upon the city of Detroit, by whose funds or credit the money has been raised. The water commissioners, until the law of 1869, were confined in their own procedure to raising money from water rates charged for the use of water. These were the primary resources for paying current expenses, and expenses for the

JONES v. WATER COMMISSIONERS OF DETROIT.

extension of the works, and whenever savings were made to the extent of five hundred dollars, they were to be invested in a sinking fund to redeem bonds. The law of 1869 is the first attempt to enable the board to raise money by rates or assessments except from water consumers.

The water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity, just as similar rates are payable to gas companies, or to private water works, for their supply of gas or water. No one can be compelled to take water unless he chooses, and the lien, although enforced in the same way as a lien for taxes, is really a lien for an indebtedness, like that enforced on mechanics' contracts, or against ships and vessels. The price of water is left to be fixed by the board in their discretion, and the citizens may take it or not as the price does or does not suit them.

The outlay of the board consists in the reservoirs and machinery for obtaining and storing water, and the pipes through which it is distributed. This property and material is authorized to be sufficient to "furnish a full supply of water for public and private purposes."—*Sec. 7.* These public purposes include "reservoirs, jets and fire hydrants, at such localities in said city as they may deem expedient," and "fountains in the public squares, or such other public grounds of said city as they shall deem expedient," with the consent of the council.

There is nothing in the amendatory act of 1869 to devote the taxes against persons not using water to any specific purpose, and, if valid, they must go, like the water rates, into the general fund of the commissioners, to be used for any of the lawful purposes and expenses of the commission. The amount is not applied to expenses or constructions on the street or in any district within which it is raised, and is not proportioned in any way to the cost of any such outlays.

The burdens levied cannot come within the class of local assessments whereby local expenditures for certain purposes are divided among the various premises in the district bene-

JONES V. WATER COMMISSIONERS OF DETROIT.

fited. Such a distribution was not designed by the statute, and, whether legal or not, would be somewhat remarkable in the case of water works, where the pipes derive all their value from the distribution of water from the reservoir or works, which may be remote, and possibly beyond the city itself, as they are authorized to be under the statutes concerning Detroit. Moreover, a large part of the property within any water district, and nearly all of it in the most important districts, is exempted from this tax, which does not apply to premises occupied by consumers of water. The tax must be regarded as something very different from a local assessment.

Its purposes being general, it is to be regarded as a tax in the most general sense of that word, and subject to the rules of law which govern taxes. It is not in any sense a specific tax, and this is not claimed. Specific taxes are laid upon certain classes of business or pursuits. But these are laid only upon persons and property not holding the relation of water consumers dealing with the commissioners. It would be absurd to call these specific taxes.

Being neither local assessments nor specific taxes, they must be governed by the constitutional rule which requires that there shall be uniform rules of taxation except on property paying specific taxes, and that assessments shall be on property at its cash value.—*Art. XIV., §§ 11, 12.* The probability is, that this property already pays its share of the general taxes of the city of Detroit required to supply means for defraying the water works debt, and levied on a cash valuation; but whether this be so or not, the present tax is not levied on any principle which is maintainable for ordinary taxation.

It is a serious question how far the legislature can fix a definite and unchangeable amount of taxation for purely local purposes coming within no purpose in which the state or the public has any concern. While the state is concerned in education and in those matters which relate to the peace and good order of the community, it has no very

 JONES v. WATER COMMISSIONERS OF DETROIT.

direct interest in local improvements. But without determining where the lines may lie, it is very clear that the present burdens imposed on parties,—not as a percentage on property, but as a charge on a limited portion of the property, and that charge laid upon its frontage on the streets,—are beyond the powers of the legislature under the rules applicable to general taxation for any purpose, whether local or of universal concern.

We do not think it worth while to discuss all of the interesting questions presented on the argument, as there is no probability that most of them will ever require judicial attention again. The decree is affirmed, with costs.

The other Justices concurred.

 The Metropolitan Life Insurance Company of New York v. Melissa Ethier.

Life insurance: False representations: Special defense: Notice: Application. Notice of special defense to a life policy on the ground of fraudulent misrepresentations, though it fail to assert in express terms that the alleged false representations were contained in the application, is held sufficient, where it refers to the application, and where plaintiff could not have been misled, to permit the introduction of the application in evidence as containing the fraudulent representations specified in the notice.

Evidence: Letter: Agency: Authority: Subsequent showing of want of authority: Practice. Where a letter has been received in evidence against objection for want of authority in the writer to act for the party, at a time when there was some showing of his agency, this ruling cannot be complained of on review, though the subsequent cross-examination disclosed that the writer had no such authority, no motion having been made after such cross-examination to strike out the letter as evidence.

Heard June 7. Decided June 13.

Error to Menominee Circuit.

This was an action upon a life insurance policy. Plaintiff recovered judgment below, and defendant brought error.

METROPOLITAN LIFE INSURANCE CO. v. ETHIER.

Edward Cahill, for plaintiff in error.

B. J. Brown, for defendant in error.

COOLEY, CH. J.:

We think the court erred in excluding the application for insurance upon which the policy issued, and the evidence offered by the defense to show that the representations contained therein regarding the health of the applicant were untrue and fraudulent. The ruling appears to have been based upon a supposed defect in the notice of defense. But we think this notice, though informal, was sufficient to let in this defense of fraud. It expressly alleged fraud in the representations made to the insurance company regarding the health of the applicant, and avers that the policy was procured thereby. It is true that the notice does not assert in express terms that the representations were contained in the application, but the application is referred to, and the plaintiff could not have been misled when it was offered in evidence as containing the fraudulent representations.

We do not find any other error in the record. When the Furthman letter was offered and received in evidence, there was some showing of his agency for the insurance company which would justify its reception. The cross-examination of the witness who had given it showed that he really had no knowledge of the subject; but the plaintiff in error made no motion to strike out the evidence of the letter, and consequently is not in position to complain now.

For the error in excluding the defense of fraud, the judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

GARTON v. UNION CITY BANK.

Jane Garton v. The Union City National Bank.

General issue: Corporate existence of plaintiff: Admission. The corporate existence of the plaintiff is admitted by the plea of the general issue.

Promissory notes: Payable to cashier: Indorsement: Evidence. A promissory note made payable to C. T. Allen, cashier, or order, indicates that it was made to him not as an individual, but as a bank officer, and that it was a contract with the bank; and in a suit upon it by the bank no indorsement by such cashier is necessary to the admission of the note in evidence.

Promissory notes: Collateral security: Nature and amount of principal demand. Where a promissory note contains on its face a memorandum that it is to be used as collateral security to other notes, it is competent in an action upon it to show the true consideration and the identity, nature and amount of the demands to which it was collateral.

Charge to the jury: Oral instructions: Exceptions: Waiver. A judgment will not be reversed on the ground that part of the charge to the jury was oral, notwithstanding a statutory requirement that it be reduced to writing, where no objection is raised on that ground until after the jury had gone out. The point was waived.

Principal and surety: Negotiations for an extension: Contracts. Where the principal debtor requests an extension of the time of payment by a letter accompanied by an enclosure as a consideration for the extension, which is not agreed to by the creditor, though he keeps the enclosure and applies it upon the debt without responding to the letter, the surety is not thereby released.

Heard June 8. Decided June 13.

Error to Eaton Circuit.

M. V. & R. A. Montgomery, for plaintiff in error.

C. J. Beerstecher, for defendant in error.

GRAVES, J:

The bank sued, and was allowed to recover, on an instrument of the following tenor:

"\$1,000. UNION CITY, MICH., May 12, 1873.

"On demand, ——— days after date, I promise to pay to C. T. Allen, cashier, or order, one thousand dollars at Union City National Bank, value received, with exchange on New York, and interest at ten per cent. after maturity.

"JANE GARTON.

GARTON v. UNION CITY BANK.

“This note is to be used as collateral security to A. Climie’s notes.”

The declaration set forth the instrument, and averred that it was made to the bank and received by the bank as collateral security for a demand it then held against Climie and for advances it might make thereafter to Climie, and then alleged certain obligations from Climie to the bank as covered by the note and charged to be due and payable. The general issue was pleaded, and the cause was tried by a jury.

A certificate of the comptroller of the currency, of the due organization of the bank in 1871, and of its right to carry on banking under the federal act, was admitted under objection. The point made against the admission of this evidence has no force. The certificate seems to have been unobjectionable. But whether it was or not, the case did not require its introduction to show corporate existence. For the purpose of the action that stood admitted.—§ 6547, *C. L.*; also *Act 109, L. 1871, p. 176*; *Thatcher v. West River Nat. Bk., 19 Mich., 196*; *Society for Propagation of the Gospel, etc. v. Town of Pawlet, 4 Pet., 480*.

It is said the note was wrongly admitted because it was made payable to the order of Allen, and was not indorsed by him. No indorsement was necessary. The instrument plainly indicated that it was made to Allen, not as an individual, but as a bank officer, and that it was a contract with the bank.

The evidence admitted in explanation of the true consideration of the note, and the identity, nature and amount of the Climie demands referred to, was not objectionable. The purpose was to correctly apply the note to the transactions it indicated it was intended to cover, and confine it to the very claims it purported to secure, and not to alter its terms or in any way inflame the liability of Mrs. Garton or prejudice her rights. It indicated on its face, or rather by the memorandum connected with it, that it was to be carried out and enforced restrictively as against Mrs. Garton, and

GARTON v. UNION CITY BANK.

with reference to particular bank demands against Climie, and the intent could not be carried out and strict protection be accorded to Mrs. Garton's rights without showing the facts. The evidence was favorable to her interests, and, as we think, was not objectionable under the rules of law.

An objection is made that two paragraphs of the charge, which are pointed out, were oral, and it is claimed that the judgment should be reversed on that account. We do not think so. No objection was raised that these passages were not reduced to writing, until after the jury had gone out, and we think the point was waived. We must see a strong case before we overturn a verdict for such a cause.

On cross-examination, Mr. Allen, the cashier, testified that Climie sent to the bank fifteen dollars by letter, and requested the bank therein to accept the money as a consideration for extending his notes; that no agreement was made, however, for an extension, and no extension given; but the fifteen dollars was placed to Climie's credit by endorsement on his note. He also stated that Climie was not advised that the bank refused to extend, and that he presumed Mrs. Garton was not aware of the circumstance.

The counsel for plaintiff in error based a request on this testimony, to the effect that the retention of the fifteen dollars and use of it, and the omission to advise Climie that the bank refused to extend, amounted to an agreement to extend, and released Mrs. Garton from liability on account of one of Climie's notes, namely: one for five hundred and fifteen dollars. This was refused, and the court think properly. Whether in case a binding agreement between Climie and the bank for the extension without Mrs. Garton's assent were admitted, she would have been released, under the circumstances, we do not consider. But it is plain that unless there was what constituted in law a binding agreement of that kind without her assent, the position taken by counsel was not tenable.

Now the witness swore that the bank refused to assent to any extension, and did not assent to it, and there was no

GARTON v. UNION CITY BANK.

showing that Climie considered that an extension was agreed on. He sent money to obtain an extension, but the bank declined to extend, yet kept the money and applied it on his debt, and it did not notify him that his proposition was refused. This keeping of the money and omitting to notify him of the rejection of his proposition, was evidence tending to show an acceptance of the request, and under certain circumstances such evidence would be sufficient to imply or raise an inference of acceptance of a proposal to extend. And in this case it was subject to be considered with the other facts, and among them the statement of the cashier that the bank did not assent, upon the question as to whether in truth an agreement to extend was actually consummated. But this retention of the money and omission to notify, etc., cannot be considered as in itself a binding agreement on the part of the bank. The request, however, proceeded on the theory that it appearing that the bank kept the money and applied it as payment on Climie's debt and did not notify him of non-acceptance, a binding agreement to extend was thereby established notwithstanding the bank in fact dissented from the offer to extend, and notwithstanding the absence of all proof that Climie understood that an extension was agreed on. If the bank did not assent to an extension, and Climie did not understand that it did so, and did not understand or suppose that any extension was secured, it would be somewhat singular to assume that after all there was such an extension by agreement between those parties.

What has been said covers all the points deemed worthy of comment, and the result is that we find nothing in the record to overturn the judgment.

The judgment should be affirmed, with costs.

The other Justices concurred.

HEISRODT v. HACKETT.

John M. Heisrodt v. Christopher Hackett.

Dogs going at large: License: Construction of statute. The statute (*Laws 1873, p. 485*) authorizing any person to kill any dog going at large and not licensed and collared, as provided by the act, is not to be extended by construction.

Dogs: Property: Value. Dogs are property and have a value.

Killing unlicensed dogs: Authority to persons: Killing by another dog: Statute construed. The authority given by this law to persons, cannot by construction be so enlarged as to embrace animals also; the statute contemplates the exercise of some judgment by the person to determine before killing the dog whether it was properly licensed and collared, and can have no application and afford no protection to a case of killing by another dog.

Dogs: License and collar: Collar lost: Reasonable time to replace it. If the owner has complied with the provisions of the act by having his dog properly licensed and collared, and by accident the collar is lost, a reasonable time must be allowed him to discover that fact and to replace the lost collar.

Submitted on briefs June 8. Decided June 13.

Error to Saginaw Circuit.

W. H. Sweet and Albert Trask, for plaintiff in error.

Thompson & Tarsney, for defendant in error.

MARSTON, J:

The plaintiff, Heisrodt, brought an action to recover damages for the loss of a small but valuable dog, which had been killed by a large dog owned by, or in the possession of, the defendant.

The defendant claimed that the plaintiff's dog was not licensed and did not wear a collar, as required by the act of 1873, at the time he was killed.

Upon this branch of the case the court charged the jury as follows:

"1. By the law of 1873, then in force, the owner of dogs was required to have a license running from the 1st of April of each year to the 1st of April of the following year; and also to cause such dog to wear a collar around his neck

HEISRODT v. HACKETT.

during the life of the license and no longer; and it is made lawful for any person, and also the duty of certain officers, to kill any and all dogs going at large and not licensed and collared according to the provisions of this act.

"2. If you find as a matter of fact that the plaintiff's dog was not licensed and was not collared within this law, the collar being marked with the name of the owner and number of the license, he could not recover the value of his dog, even if killed by the defendant's dog, provided his dog was running at large. He could not be considered as running at large if he was on his owner's premises. But if you find the plaintiff's dog was at large, outside the plaintiff's premises, plaintiff cannot recover, even if his dog was killed by the defendant's dog."

3. Plaintiff's counsel requested the court to charge the jury "that if they find the dog had been properly licensed and a proper collar had been placed upon his neck, and by accident the collar had been lost off of the dog's neck, and the plaintiff had no opportunity to replace it between the time of its loss and the killing of the dog, that the plaintiff was equally protected by the law as if the dog had the collar on." This was refused.

The requirements of the act of 1873 (*Laws of 1873, p. 483*) sufficiently appear in the charge of the court as given. The sixth section of that act is as follows:

"Any person may, and it shall be the duty of every police officer and constable of any township or city, to kill any and all dogs going at large and not licensed and collared according to the provisions of this act, and such officers shall be entitled to receive from the township or city treasury fifty cents for each dog so killed by them."

Defendant claimed protection under this section.

A statute under which a party is, in so summary a manner, to be deprived of his property, by having it destroyed, should not be extended by construction. That dogs have a value and are the property of their owner, cannot be well denied at the present day, whatever may have been the rule

HEISRODT v. HACKETT.

heretofore. And without questioning the power of the state to prescribe such regulations as may be deemed necessary and proper to prevent injury being done by them, yet we cannot say that where the legislature has authorized persons to kill dogs found running at large contrary to the act, the authority thus given to persons can by construction be so enlarged as to embrace animals also. The legislature, undoubtedly, in adopting this statute, contemplated that at least some judgment would be exercised by the person before killing the dog; that he would take some steps to ascertain whether the dog was licensed and collared before killing him, and if found not properly licensed and collared, then for that reason and that alone he should be killed. No such judgment or discretion could have been exercised in this case, nor can there be any pretense that the dog was killed because he was found running at large contrary to the provisions of the act. We think the court erred, therefore, in its second charge to the jury. The court also erred in refusing to charge as requested by plaintiff's counsel. If the plaintiff had complied with the provisions of the act by having his dog properly licensed and collared, and by accident the collar was lost, a reasonable time must have been allowed the plaintiff to discover that fact and replace it. There is so much justice and common sense in thus allowing the owner time to discover and replace the lost collar that no argument is required to demonstrate it.

The judgment must be reversed, with costs, and a new trial awarded.

The other Justices concurred.

YANER v. PEOPLE.

George W. Yaner v. The People.

Criminal examinations: Presentment by grand jury. The examination of persons charged with offenses not cognizable by a justice of the peace, was designed to take the place of a presentment by the grand jury, but it was not designed thereby to deprive the accused of any substantial right that existed before.

Criminal complaints: Examination: Warrant: Offense charged. In making the complaint and in the examination of witnesses previous to the issuing of the warrant, the proceedings are not only *ex parte*, but general, and not confined to any particular offense, but the warrant must specify some particular offense, and the proceedings thereafter become specific and limited by the offense charged in the warrant.

Warrant: Offense charged: Different degrees: Examination. Where the offense charged in the warrant includes one or more others of lesser degree, the magistrate should determine which offense, if any, has been committed, to the end that the accused may not be put upon trial for an offense different or greater than that for which he had been examined and held for trial.

Criminal examinations: Duties of magistrates: Offense charged. The examining magistrate is not to be required to nicely weigh evidence as a petit jury would, nor to discharge the prisoner where there is a conflict of evidence, or in case of a mere reasonable doubt of his guilt; and his inquiry may extend to all the facts connected with the charge, though they show an offense different or greater than that charged; but if it appear that a higher or different offense has been committed, a new warrant should thereupon be issued charging the proper offense, upon which an examination may be had.

Examining magistrate: Offense charged. The magistrate must, however, upon the examination of the whole matter, determine whether an offense has been committed, and he must at the same time specify it, so that it may be seen whether it is an offense bailable by him or not.

Criminal examination: Specific offense: Murder: Manslaughter: Information: Motion to quash. Where upon examination under a warrant charging the offense of murder, the magistrate refused upon request to determine whether the evidence adduced showed probable cause to believe the offense committed was murder or only manslaughter, and his return affirmatively showed such request and refusal, an information for murder having been filed, it was held that a motion to quash on this ground ought to prevail.

Heard June 13 and 14. Decided June 15.

Error to Ionia Circuit.

Mitchel & Pratt, for plaintiff in error.

Andrew J. Smith, Attorney General, for the People, referred to *Turner v. People*, 33 Mich., 363.

YANER v. PEOPLE.

MARSTON, J :

The respondent was arrested, examined and held for trial, upon a complaint charging him with having committed the crime of murder. An information containing a similar charge was filed in the circuit court, upon which he was tried, found guilty of manslaughter, and sentenced to state prison for seven years.

Before pleading, a motion was made on behalf of the respondent to quash the information, "because it affirmatively appeared that the examining magistrate refused to determine whether the facts proven on the examination amounted to manslaughter or murder." The magistrate, in obedience to an order of court, made a special return, the part upon which this objection was based being as follows:

"And I further certify and return that I, the said magistrate, did refuse to pass upon the question raised by said respondent's counsel, whether the proof would amount to murder or manslaughter. I did rule and decide that was a question for a petit jury, and not for the examining magistrate."

The examination of persons charged with offenses not cognizable by a justice of the peace was designed to take the place of a presentment by the grand jury. The law was always very strict in requiring grand juries to be definite and specific in relation to the offense charged in the indictment upon which it was sought to put the accused upon trial. The indictment could not be amended by the prosecuting attorney, nor could the accused be tried for another and different offense than the one charged. The statute permitted certain amendments to be made, but these were more in matter of form than substance; they did not change the nature of the accusation.

The legislature, in substituting or permitting examinations instead of indictments, did not intend thereby to withdraw from, or deprive a person accused of crime of any substan-

YANER V. PEOPLE.

tial right which previously existed. It was not designed that an examination in form only should be gone through with, and the accused bound over and put upon trial in the circuit court for an offense which the magistrate did not judicially determine to have been committed.

The statute provides that whenever complaint shall be made to a magistrate that a criminal offense not cognizable by a justice of the peace has been committed, he shall examine on oath the complainant and any witnesses who may be produced; and if it shall appear from such examination that any criminal offense not cognizable by a justice of the peace has been committed, the magistrate shall issue his warrant, directed, etc., reciting the substance of the accusation, etc.—§§ 7844, 7845, *C. L.* In all cases where the offense charged in the warrant is not punishable with death, or imprisonment in the state prison, the party may be admitted to bail before a magistrate of the county where the arrest was made.—§§ 7847-8. It is very evident from an examination of this chapter (259) that when a complaint is first made, the examination of the complainant and witnesses then produced, is not only *ex parte*, but general. It is not confined to any particular offense, but if it appears from the whole examination that any criminal offense not cognizable by a justice has been committed, the magistrate shall issue his warrant; the warrant so issued must, however, specify some particular offense. What up to this time was general, now becomes more specific, and limits the subsequent proceedings. The magistrate, before whom any person is brought upon a charge of having committed an offense not cognizable by a justice of the peace, shall proceed to examine the complainant and the witnesses in support of the prosecution, on oath, in the presence of the prisoner, *in regard to the offense charged, and in regard to any other matters connected with such charge*, which he may deem pertinent.—§ 7855. And it is only when it shall appear from such examination that an offense not cognizable by a justice of the peace has been committed, and

YANER v. PEOPLE.

that there is probable cause to believe the prisoner guilty thereof, that he can be held for trial.—§§ 7859, 7860. The clear evident intent of this statute was, that the magistrate should exercise his best judgment in the matter; that he should from the testimony determine whether the crime charged in the warrant had been committed, or where, as in this case, the offense charged includes one or more of lesser degree, the magistrate should determine which offense, if any, had been committed, so that the accused might not be placed upon trial in the circuit to answer to a charge different or greater than the one upon which he had been examined, and to answer which he had been held for trial. If this were not so we would have the magistrate binding over for one offense, and the prosecuting attorney filing an information for another or different one, or the magistrate binding over to answer to an offense of one degree, and the prosecuting attorney filing an information for a like offense of a higher degree. In either case the offense charged in the information would be one not authorized by the examination, and it never was intended that the prosecuting officer should file an information in the circuit court charging an offense different or greater than the one upon which the accused had been examined and held for trial.

We do not desire to be understood that the magistrate must nicely weigh evidence as a petit jury would, or that he must discharge the accused where there is a conflict of evidence, or where there is a reasonable doubt as to his guilt; all such questions should be left for the jury upon the trial. Or that where the charge in the warrant is one of a minor degree, as manslaughter, the magistrate may not inquire fully into all the facts connected therewith, even although they should show that an offense of a higher degree, as murder, had been committed; or even show a different offense in connection therewith, as that the homicide charged originated in a riot, a burglary, robbery, or attempt thereto. In all such cases, if it should appear, either upon the whole examination, or at any time during the progress thereof,

YANER v. PEOPLE.

that a higher offense, either of the same or a different degree than that charged in the warrant, had been committed, it would then be the duty of the magistrate, without any further or other preliminary complaint or examination, to issue a new warrant charging such accused with the higher offense, and proceed thereon as in other cases. Or that within certain limits, heretofore referred to by this court, the prosecuting officer may not, when he comes to file an information, put it in such form as, in his opinion, will enable him to try the offense upon the merits in the way most effectually to advance the ends of justice. There is a wide difference between this and that class of cases.

There are still other reasons for coming to the same conclusion, and the present case is a good illustration of the danger which would likely result should any other course be adopted.

Persons charged with crime are entitled of right to bail in all cases, except for capital offenses, or for murder in the first degree where the proof is evident or the presumption great.— 7968. And the statute in pointing out the duty of the justice upon an examination, where it appears that an offense not cognizable by a justice has been committed, and there is probable cause to believe the prisoner guilty thereof, further provides that “*if the offense be bailable by the magistrate, and the person offer sufficient bail, it shall be taken and the prisoner discharged; but if no sufficient bail be offered, or the offense be not bailable by the magistrate, the prisoner shall be committed to prison for trial.*”—§ 7860. The magistrate therefore must, “upon the examination of the whole matter,” determine whether an offense has been committed, and he must at the same time specify it, so that it may be seen whether the offense specified be bailable by the magistrate or not. This is one of the rights of the accused, of which the magistrate, by a failure to specify the offense, should not be permitted to deprive him. It may be necessary to his future liberty that he should be admitted to bail, so as to prepare to meet the charge of which, perhaps, he

YANER v. PEOPLE.

has been wrongfully accused. We cannot act upon the theory that every person held for trial is necessarily guilty of the offense charged in the warrant of arrest. So jealous have the people been of this right to bail that a constitutional provision has been adopted against excessive bail being required. If the magistrate could not require excessive bail, could he by declining to specify the offense deprive the accused of bail in a case like the present?

The statute further requires the magistrate, whenever no sufficient bail is offered, and the prisoner is committed to jail, to certify, upon the mittimus issued by him, the sum for which bail is required, so that the prisoner might afterwards offer sufficient bail to the clerk of the court.—§ 7875. And it was held in *Matter of Leddy*, 11 Mich., 198, that if the justice failed so to do the commitment would be invalid.

In this case the question is not left to conjecture or presumption; the magistrate in his special return affirmatively shows that he refused to determine "whether the proof would amount to murder or manslaughter." Clearly, then, he did not determine from the evidence adduced upon the examination that the offense was murder, or that there was probable cause to believe the accused guilty of such an offense. It thereupon became his duty to fix the amount of bail, as the offense, if any, was aailable one, and admit the accused to bail, if sufficient bail was offered, and if no sufficient bail was offered, to specify upon the mittimus the amount for which bail should be required.

For these reasons the information should be quashed, the judgment set aside, and the prisoner discharged.

The other Justices concurred.

 PERRIN v. LEPPER.

Horace J. Perrin and another v. Josiah Lepper and another.

Rents: Co-tenants: Non-joinder: Abatement: Apportionment. In an action to recover rent the non-joinder of a co-tenant as plaintiff can only be set up in abatement, and where not so pleaded it will go merely to apportion the damages.

Deeds: Grantor's interest. An owner of property, or any interest therein, may grant, convey or assign his right or interest without requiring the assent or acquiescence of any third person, and the grantee or assignee will take, hold and enjoy the property so acquired in the same manner and with the like rights that his grantor or assignor had.

Deeds: Lessor: Rents: Grantee: Assignee. The lessor of real estate may convey his reversion and his grantor will be entitled to the rents accruing thereafter, or he may assign the reversion, reserving the rents, or assign the rents, due and to become due, and in either case when the rents are assigned, the assignee may sue and collect them in his own name under our statutes.

Deeds: Rents: Attornment. A conveyance of leased lands with the reversion, remainder, "rents, issues and profits thereof," transfers to the grantee the right to collect and sue for the rent thereafter accruing, and the tenant cannot defeat his action by refusing to attorn to him.

Attornment. The doctrine of attornment grew out of the peculiar relations existing between the landlord and his tenant under the feudal law, and the reasons for the rule never had any existence in this country, and it is inconsistent with our laws, customs and institutions; beyond its application to estop a tenant from denying the title of his landlord, it can serve but little if any useful purpose.

Heard April 20. Decided June 20.

Error to Calhoun Circuit.

T. G. Pray, for plaintiffs in error, to the point that a deed carries all the vendor's interest, cited: 26 Mich., 399; that a grant of a reversion carries with it, as an incident thereto, the rent remaining to grow due: 14 Barb., 654; 17 Barb., 155; *Bank v. Wise*, 3 Watts, 394; *Taylor L. & T.*, §§ 154, 161; 1 Wash. on R. P., 340, §§ 8, 9; that the doctrine of attornment is inconsistent with our institutions, being feudal in origin, and must be confined to cases where its application is a necessity: 1 Foster, 234; 4 Foster, 248; 13 Ill., 626; 1 Wash. R. P., 340, § 7; that plaintiffs were entitled to sue for their moiety without joining their co-

PERRIN v. LEPPER.

tenant: 1 Wash. R. P., 341, § 8, note 3, § 9; Cooley's B. Com., 459; 17 Barb., 155; 3 Bosw., 63.

Brown & Patterson, for defendants in error, that the deed to plaintiffs did not transfer the right to sue for the rents, cited: 1 Saund., 237; *Smith L. and T.*, 357, 361, note 12; 57 E. C. L., 929; *Crawford v. Chapman*, 17 Ohio, 451; *Van Rens v. Hays*, 19 N. Y., 81; *Trask v. Green*, 9 Mich., 365; that they could not sue in assumpsit: C. L. 1871, §§ 6194, 4301, 4302; 5 Denio, 454; *Smith L. and T.*, 374; that plaintiffs were not entitled to sue without joining their co-tenants: *Beer v. Beer*, 12 C. B.; *Janes v. Felch*, 3 Bosw., 64; *Wilkinson v. Hall*, 27 E. C. L., 555; 10 E. C. L., 524; 5 B. & Ald., 675; 7 E. C. L., 462; *Smith L. and T.*, 83-4; 17 E. C. L., 685; *Wall v. Hinds*, 4 Gray, 256; 1 Wash. R. P., 437; 3 Cruise Dig., 347-8.

MARSTON, J:

Brown and Van Arman being the owners, as tenants in common, of certain property in Marshall, on the 6th of September, 1859, leased the same to defendants for a term of five years from and after that date, for which defendants agreed to pay them two hundred and seventy-five dollars per year, payable quarterly. On the 12th day of April, 1862, Van Arman by warranty deed conveyed his interest in said premises, together with the rents, issues and profits thereof, to plaintiffs, who, about the 14th of April, 1862, gave defendants notice of such purchase, and that they, the plaintiffs, would require one-half the rent from and after that time. This request not having been complied with, plaintiffs, December 29, 1863, commenced this action to recover the amount of rent claimed by them. In their declaration they declared specially upon the lease, setting forth the conveyance by Van Arman to them, and also inserted a count for

PERRIN v. LEPPER.

use and occupation. The court charged the jury that in order for plaintiffs to recover upon either count, it was incumbent on them to prove that before the action was commenced the Leppers had recognized and acknowledged the relation of landlord and tenant as existing between them; in other words, that there had been an attornment. There being no such evidence, plaintiffs failed. To this ruling they excepted, and the question here raised is really the only one in the case. It is true that counsel for defendants in error insists that the plaintiffs, even if entitled to recover, could not sue alone, but must have joined their co-tenant of the reversion in bringing this action. It may be doubtful whether such a question properly arises under the ruling of the court, but as a new trial must be ordered, and this question may again come up, we may as well dispose of it at the present time, by saying that the non-joinder could only be set up in abatement, which was not done in this case, and if not so pleaded, it would more go to apportion the damages.—*Achey v. Hull*, 7 Mich., 430.

It has come to be the generally accepted doctrine in this state, that a person who owner of real estate, personal property or choses an action, or who has an interest therein, may grant, convey or assign his right or interest, without the assent or acquiescence of any third person, and that the grantee or assignee will take, hold and enjoy the property so acquired in the same manner and with the like rights that his grantor or assignor had. The law has always been very liberal in this state in permitting assignments of choses in action, and now permits the assignee to sue and recover thereon in his own name. The lessor of real estate may convey his reversion, and his grantee will be entitled to the rents accruing thereafter, or he may assign the reversion, reserving the rents, or assign the rents due and to become due. In either case when the rents are assigned, the assignee may sue and collect them in his own name under our statute. The conveyance from Van Arman to plaintiffs was of his entire interest in the demised premises, "and the reversion and reversions,

PERRIN v. LEPPER.

remainder and remainders, rents, issues and profits thereof." The effect of this conveyance was not to release defendants from the payment of rent; they could no more thereafter than before retain the beneficial use and enjoyment of the demised premises and at the same time be exempt from the payment of rent under their lease. Van Arman, however, after his conveyance was no longer entitled to collect this rent. That right he had transferred and assigned to the plaintiffs. If defendants, by refusing to attorn to the plaintiffs, can prevent their collecting, the only effect would be to complicate matters and place obstructions in the way of the sale of demised premises. The doctrine of attornment grew out of the peculiar relations existing between the landlord and his tenant under the feudal law. The landlord could not alienate the estate without the consent of his tenant. This consent was called an attornment. It was founded upon a state of society which certainly never had any existence in Michigan. The peculiar reasons and relations out of which this doctrine sprung never having had any existence here, why should the rule itself? Where the reasons from whence a rule arose cease to exist, the rule should cease also. In a country where they never existed, the rule should not be adopted. Of course there may be exceptions to this. Other reasons for continuing a rule may arise while those from whence the rule grew have passed away, but we discover none such in this instance. The doctrine of attornment is inconsistent with our laws, customs and institutions. It may serve a useful purpose in estopping a tenant from denying the title of a landlord to whom he has attorned, but beyond this it can be of but little if any use. "The common law of England is not to be taken, in all respects, to be that of America. Our ancestors brought with them its general principles, and claimed it as their birth-right; but they brought with them and adopted only that portion which was applicable to their situation."—*Story, J.*, in *Van Ness v. Pacard*, 2 Pet., 144; or as was said in *Lor-man v. Benson*, 8 Mich., 25: "Questions of property, not.

PERRIN v. LEPPER.

clearly excepted from it, must be determined by the common law, modified only by such circumstances as render it inapplicable to our local affairs."—*Cooley's Const. Lim.*, 23 and note.

I am of opinion that the court erred in charging the jury that an attornment was necessary to entitle the plaintiffs to recover. The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

Noah W. Cheever v. Edward H. Congdon and others.

Evidence: Age: Witness. It is competent for a person to testify as a witness to his own age.

Guardian and ward: Settlement by ward after majority. It is a complete defense to an action brought at the instance of the guardian of a minor, upon the bond of an executor, to recover an amount the minor was entitled to from the testator's estate, that the minor after attaining his majority settled the whole claim with the executor, receiving payment partly in cash and partly by note; and the fact that the guardian at the time of such settlement had not settled his trust account, is nothing to the point.

Submitted on briefs June 7. Decided June 30.

Error to Washtenaw Circuit.

Joslin & Whitman, for plaintiff in error.

A. J. Sawyer, for defendants in error.

GRAVES, J:

This action was brought at the instance of David Congdon as guardian of Henry Congdon, a minor, on the bond given by Edward H. Congdon as executor of Elisha Congdon, deceased, to recover an amount the minor was entitled

CHEEVER v. CONGDON.

to from the estate of Elisha Congdon, and which amount the probate court had ordered should be paid to him. The case was tried by the court without a jury. The defense was, that after attaining majority, Henry Congdon, who had been the ward of David, as before stated, settled the whole matter with Edward, the executor, and received from the latter in cash and note the entire amount due him. To make out this defense the defendants called Henry Congdon and he swore positively to the accord and satisfaction, and that it occurred in January, 1872. In the same connection he was asked by defendants when he became twenty-one years old. The plaintiff's counsel objected that the witness was incompetent to prove his own age until it should be shown that better evidence was not attainable.

The court overruled the objection and the witness answered that he became twenty-one on the 24th of December, 1870.

The objection was not well based. The witness was clearly competent. The only question about the testimony called for from him was confined to its value as evidence, and that was a matter to be considered by the judge in making up his finding of facts.

On the conclusion of the evidence the court found that the settlement was made as claimed, and as a consequence that the defense was established.

The plaintiff's counsel insist that inasmuch as the guardian who caused this suit to be brought had not settled his trust account when the settlement by his former ward was had with the executor, such settlement was no defense for the executor in the suit on the bond. The court think otherwise. When the ward attained majority his disability ceased and the authority of the guardian to act in his stead expired. He was thenceforth entitled to act for himself and bargain with third persons who were indebted to him independently of his former guardian and according to the dictates of his own judgment. He was fully competent to call in debts due to him and give lawful acquittances. He

CHEEVER v. CONGDON.

was entitled to claim control over the management of this very cause, and in a situation to call his former guardian to account. The demand sued for was his, and being of full age, there was no lawful obstacle to prevent his receiving it from his debtor, in a form satisfactory to himself, and discharging the claim.

This disposes of all matters insisted on in the plaintiff's brief. The judgment should be affirmed, with costs.

The other Justices concurred.

Frederick Fox v. Henry L. Holcomb.

Eminent domain: Condemning lands for mill purposes: Petition. The petition whereby proceedings are instituted to condemn lands for mill purposes under the statute (*S. L. 1873, p. 486*) should show affirmatively that the proposed dam will not injure any mill or mill site, above or below, on the same stream, this being a limitation expressly fixed by the statute upon the exercise of the right conferred.

Eminent domain: Dams: Navigable streams: Authority from supervisors: Petition. The constitution (*Art. XVIII, § 4*) inhibiting the damming of navigable streams, except by authority of the supervisors, the petition by which lands are sought to be condemned for the erection of a dam for mill purposes should show whether the stream is a navigable one or not, and if navigable, that the requisite permission has been obtained.

Proceedings to condemn lands: Petition: Jurisdiction. In such proceedings the petition is jurisdictional and should affirmatively allege every fact necessary to entitle the petitioner to make the desired improvement, and to enable the parties whose rights would be affected thereby to disprove the same.

Heard June 7. Decided June 20.

Certiorari to Probate Court of Gratiot County.

Leonard & Scott, for plaintiff in *certiorari*.

Spaulding & Cranson, for defendant in *certiorari*.

MARSTON, J:

Defendant in error presented a petition to the probate

FOX v. HOLCOMB.

court of Gratiot county under *Act No. 196 of the Session Laws of 1873, p. 486*, praying for the appointment of commissioners to ascertain and determine the necessity of taking certain lands therein described for the purposes set forth in the petition. Defendant in error, in setting forth the facts in his petition, followed and complied with the provisions of section three of the act, but did not go beyond or set forth any other facts than as required by that section. Section five permits all persons whose estates or interests are or may be affected by the proceedings to show cause against the prayer of the petition, and permits them to disprove any of the facts alleged therein. Beyond this, however, they cannot go, so that the inquiry upon the hearing is restricted to the facts set forth in the petition. If, therefore, the petitioner is only required to set forth in his petition the facts referred to in section three of the act, some of the most important questions likely to arise in such cases could not be inquired into. The twelfth section provides that no dam shall be erected or raised to the injury of any mill existing either above or below it on the same stream, nor to the injury of any mill site, whether a mill-dam shall have been lawfully built or used thereon or not. If the petition does not negative this fact, the parties interested cannot disprove it, even although there should be a mill site upon the lands sought to be overflowed. Again, the petitioner cannot construct a dam across a navigable stream unless permitted by the board of supervisors of the proper county. He should, therefore, if the stream is a navigable one, set forth in his petition that he had obtained the requisite permission, so that issue could be taken thereon. It is true he may claim that the stream is a private one, that no such authority is necessary, and need not, therefore, be set forth in the petition. This may, however, be a disputed fact, and the petitioner should not be permitted, by omitting all reference thereto in his petition, to prevent the parties interested from inquiring into and disproving all such matters.

FOX v. HOLCOMBE.

The petition is jurisdictional and should affirmatively allege every fact necessary to entitle the petitioner to make the desired improvement, and to enable the parties whose rights would be affected thereby to disprove the same.—*Clay v. Pennoyer Creek Improvement Co., supra, p. 204.*

The petition in this case is defective in these respects and gave the court no jurisdiction. We were urged upon the argument to consider and pass upon the constitutionality of the act, notwithstanding the fact we might conclude that the court acquired no jurisdiction. As a rule, however, we do not consider it proper in cases where, from defects in the proceedings, the court acquired no jurisdiction, to proceed and discuss questions such as are raised in this case. There may be and sometimes are cases of sufficient public importance to warrant a departure from this rule, but this is not one of them.

For the reasons given, and without noticing other alleged errors, the proceedings before the probate court must be quashed and held for naught, with costs.

The other Justices concurred.

Asenath Hungerford v. Cyrus Smith.

Foreclosures: Production of securities: Loss: Continued efficacy. In a foreclosure suit the production of the securities is necessary to enable the complainant to recover, unless their loss is sufficiently accounted for and clear proof given of their continued efficacy.

Foreclosures: Lost securities: Long delay. Where a foreclosure bill is brought against an alleged subsequent purchaser, after the death of the mortgagor and nearly twenty years after the maturity of the mortgage, a very satisfactory showing of a continuing obligation is required, in the absence of the securities themselves.

Heard June 8. Decided June 20.

Appeal in Chancery from Clinton Circuit.

HUNGERFORD v. SMITH.

Spaulding & Cranson, for complainant.

R. Strickland, for defendant.

CAMPBELL, J:

Complainant brought her bill to foreclose a mortgage alleged to have been executed with two notes, in favor of one John Pace, on the 18th of June, 1851. Complainant claims that she became owner of the securities in June, 1853, as widow of John Pace, by assignment under an order of the court of probate of St. Clair county, where she then lived. This suit was brought in 1874 in Clinton county, more than twenty years after the maturity of one of the notes and nearly that period after the maturity of the other. She claims that both notes and mortgage were destroyed by fire, while in the custody of Joab Baker at St. Johns, within four or five years after the maturity of the notes. George W. Stoddard, the mortgagor, is dead, and the suit is brought against a party alleged to be a subsequent purchaser.

The production of the notes and mortgage was necessary to enable complainant to recover, unless their loss is sufficiently accounted for, and clear proof given of their continued efficacy. The testimony entirely fails to account for them. It shows, in our opinion, that the notes were never in the possession of Mr. Baker, and no attempt is made to show their existence elsewhere, or their loss from any other custody. The long and unreasonable delay in suing, and the death of the debtor, render it necessary to require at least satisfactory proofs of a continuing obligation, and no such proofs are to be found.

We think there was no foundation for a decree, and that the court erred in granting one. The decree must be reversed, and the bill dismissed, with costs of both courts.

The other Justices concurred.

SMITH v. GRAHAM.

Jonathan Smith v. Josephine Graham and another.*Mortgages: Subsequent purchaser: Recognition of the mortgage: Estoppel.*

One who has bought lands subject to a mortgage and has subsequently expressly recognized it by an agreement with the mortgagee for forbearance is not at liberty thereafter to dispute its existence or validity.

Mortgages: Agreement to pay increased rate of interest: Charge upon the land: Statute of frauds. An agreement in writing between a subsequent purchaser of mortgaged lands and the mortgagee, for the payment of an increased rate of interest after due, in consideration of an extension of time, is held sufficient under the statute of frauds to charge the land, where no rights of third persons intervene.*Heard June 8. Decided June 20.*

Error to Oakland Circuit.

C. & W. N. Draper, for complainant.

J. L. Topping, for defendants.

CAMPBELL, J.:

This was a bill to foreclose a mortgage made by Josephine Graham to the complainant. The defendant Wixom purchased the land subject to the mortgage, and agreed in writing to pay to Smith ten per cent. interest, instead of seven, after payments became due. The decree below allowed this ten per cent. against the land, as well as against Wixom.

The grounds of defense against the mortgage itself appear to us to be frivolous. Not only is the mortgage shown to be genuine, but Wixom bought subject to it and expressly recognized it by an agreement with the complainant for forbearance. That agreement referred to it as a mortgage made by Mrs. Graham and her husband, but the mortgage was otherwise identified, and there can be no doubt of its existence or validity.

Whether the agreement to pay ten per cent. for forbear-

SMITH v. GRAHAM.

ance attached to the land, is the only real question in the cause. In *Spear v. Hadden*, 31 Mich. R., 265, it was held that an agreement by a subsequent purchaser endorsed upon a note did not attach to the land in the hands of persons thereafter purchasing, nor did it, as there made, against any one.

But in the present case Wixom made an agreement in writing in the following terms:

“SPRINGFIELD, May 26, 1873.

“This is to certify that I, Isaac Wixom, agreed to pay Jonathan Smith ten per cent. interest on all sums, interest and principal, after the payments become due, on a certain mortgage given by Josephine Graham and William Graham to Jonathan Smith, and recorded in Liber 64, pages 146 and 147, the first day of December, 1871, at 12 o'clock. The said land covered by said mortgage is now owned by said Wixom.

“(Signed)

ISAAC WIXOM.”

It seems to us evident that this instrument was designed to connect the agreement with the mortgage. If so, it was sufficient under the statute of frauds to charge the lands, inasmuch as Wixom owned it and there were no third parties concerned whose rights would be beyond the operation of such an agreement.

This being the case, the principle of *Spear v. Hadden* does not apply, and the decree was correctly framed in allowing the ten per cent. rate of interest stipulated.

The decree must be affirmed, with costs.

The other Justices concurred.

BURROWS v. BANGS.

Delabar Burrows v. Benjamin Bangs.

Mortgages: Certificate of deposit: Payment: Risk of loss. Complainant negotiated with defendant for a loan of \$2,000 to enable him to pay off two mortgages on his farm, one for \$800 and one for \$1,000, the latter held by one McGinnis, and past due but payment not required for three months to come; defendant was willing to loan the amount only on a first mortgage on the farm, but on applying to his banker for the funds, the banker, though owing him more than the amount, could not well pay the whole sum at once, and it was therefore arranged that one-half should be paid down, and turned over to complainant, out of which the \$800 mortgage was to be satisfied; that complainant should give defendant a mortgage on the farm for \$2,000, and that the banker should give his certificate of deposit for \$1,000 payable to the order of complainant when the McGinnis mortgage should be discharged; the banker failed before the day at which it was arranged the McGinnis mortgage was to be paid and the certificate became worthless; complainant paid back the thousand dollars received from defendant, with the interest thereon and tendered him the certificate of deposit and required a discharge of his mortgage, which being refused he filed this bill to have the mortgage declared satisfied:—

Held, That there being no express agreement that complainant should receive the certificate as payment, and the fair inference from all the facts being that it was only held by him as collateral and not as payment, the loss upon the certificate should be borne by defendant and complainant should have the relief prayed.

Evidence: Certificate of deposit: Ownership: Bank accounts. In such case the fact that defendant after the giving of this certificate of deposit settled with the banker on the basis of a credit to the latter for the amount thereof could have no bearing on the question of whose risk the certificate was held at, for the banker should, as between him and defendant, be credited with the amount of the certificate while it was outstanding, no matter who owned it.

Evidence: Certificate of deposit: Risk of loss. Nor does the fact that complainant attempted to get the money on the certificate before the day fixed tend to show an understanding that he considered the certificate as being held at his risk.

Mortgages: Refusing discharge: Statutory penalty: Good faith. There having been an honest difference between the parties regarding their rights, the statutory penalty is not imposed upon defendant for refusing to discharge the mortgage after it had been satisfied.

Heard June 8. Decided June 20.

Appeal in Chancery from Oakland Circuit.

T. G. Smith and *M. E. Crofoot*, for complainant, as to when paper transferred is to be held to have been received as payment, cited: *Ellis v. Wild*, 6 Mass., 321; *McIn-*

BURROWS v. BANGS.

tyre v. Kennedy, 29 Pa., 448; *McLaughlin v. Borard*, 4 Watts, 308; *Tobey v. Barber*, 5 Johns., 68; *Johnson v. Weed*, 9 Johns., 310; *Reget v. Merrit*, 2 Caines, 117; *Berry v. Griffin*, 10 Md., 27; *Perit v. Pittsfield*, 5 Rawle, 166; *Van Eps v. Dillage*, 6 Barb., 244; *Archibald v. Argall*, 53 Ill., 309; *Lear v. Freeland*, 45 Miss., 559; *Kearslake v. Morgan*, 5 T. R., 513; *Laide v. Rhodes*, 1 M. & W., 154; *Glenn v. Smith*, 2 G. & J., 493; *Huse v. McDaniel*, 33 Iowa, 406; *Jewett v. Bleak*, 43 Ind., 568; *Matteson v. Ellsworth*, 33 Wis., 488; *Lindsey v. McClelland*, 18 Wis., 481; *Mooring v. Ins. Co.*, 27 Ala., 254; *Welch v. Allington*, 23 Cal., 322; *Davidson v. Bridgeport*, 8 Conn., 472; *Hodgen v. Latham*, 33 Ill., 344; *May v. Gamble*, 14 Fla., 467; *Middlesex v. Thomas*, 20 N. J. (5 C. E. Gr.), 39; *Jose v. Baker*, 37 Me., 465; *Ward v. Bourne*, 56 Me., 161; *Govern v. Littlefield*, 13 Allen, 127; *Bridge v. Batchelder*, 9 Allen, 394; *Berry v. Griffin*, 10 Md., 27; *Hall v. Richardson*, 16 Md., 396; *Derickson v. Whitney*, 6 Gray, 248; *Devlin v. Chamblin*, 6 Minn., 468; *Barnet v. Smith*, 30 N. H. (10 Foster), 256; *Wright v. Lawton*, 37 Conn., 167; *Gorgan v. Prime*, 10 Ired., 385; *Whitbeck v. Van Ness*, 11 J. R., 408; *Noel v. Murray*, 13 N. Y., 167; *Young v. Stahelin*, 34 N. Y., 258; *Gardner v. Gorham*, 1 Doug., 507; *Allen v. King*, 4 McLean, 128; *Hudson v. Bradley*, 2 Cliff., 130; *Baker v. Draper*, 1 Cliff., 420; *Downey v. Hicks*, 14 How., 240; *Maze v. Miller*, 1 Wash. C. C., 328; *Harris v. Donaldson*, 4 Wash. C. C., 271; *Peter v. Beverly*, 10 Pet., 558, 567; *Lyman v. U. S. Bk.*, 12 How., 225; *Hooper v. Strasburger*, 37 Ind., 390; *Hotchin v. Secor*, 8 Mich., 494; *Phoenix Ins. Co. v. Allen*, 11 Mich., 501.

- A. C. Baldwin, for defendant, argued that the legal presumption is, that a negotiable bill was intended to be,

BURROWS v. BANGS.

and in fact is, an extinguishment of the original demand: *Varner v. Nobleborough*, 2 Me., 121; *Descadillas v. Harris*, 8 Me., 298; that a promissory note, if given and accepted as payment of a debt, will be regarded as payment: *Abercrombie v. Mosely*, 9 Port., 145; *Slocumb v. Holmes*, 2 Miss., 139; *Comstock v. Smith*, 14 Me., 202; *Newell v. Hussey*, 18 Me., 249; *Pope v. Tunstall*, 2 Ark., 209; *Watson v. Owens*, 1 Rich., 111; *Carr v. Hall*, 5 Mo., 59; *Bange v. Warren*, 34 Me., 324; *Paine v. Dwinell*, 53 Me., 52; *Ferdon v. Jones*, 2 E. D. Smith, 106; *Heidenheimer v. Lyon*, 3 E. D. Smith, 54; that the taking of the note raises the presumption that a settlement is made of all outstanding matters: *Maynard v. Johnson*, 4 Ala., 116; *Butts v. Dean*, 2 Met., 76; *Ilsby v. Jewett*, 2 Met., 168; *Fowler v. Lerding*, 34 Me., 455; *Woodville v. Reed*, 26 Md., 179; *Morse v. Elleber*, 4 Rich. S. C., 600; *Rowe v. Collier*, 25 Texas (Supp.), 252; *Collamer v. Langdon*, 29 Vt., 32; *Hutchins v. Olcott*, 4 Vt., 555; *Wait v. Brewster*, 31 Vt., 516; *Arnold v. Sprague*, 34 Vt., 402; *Plankinhorn v. Cave*, 2 Yeates, 370; that "if a person buy goods of another who agrees to receive a certain bill in payment, the buyer's name not being on it, and that bill being afterwards dishonored, the person who took it cannot recover the price of his goods from the buyer:" 15 East., 7; *Ellis v. Wild*, 1 Mass., 321; *Noel v. Murray*, 13 N. Y., 167; *American Leading Cases*, 297, 298, 299, and 300; that upon the question of presumption of payment there is a uniformity of authorities in all the states, and this presumption must be rebutted by affirmative proof; a mere statement that "he did not receive it in payment will not suffice;" and it is *prima facie* evidence of a settlement of accounts: *Thornton v. Williams*, 14 Ind., 518; *Gaskin v. Wells*, 15 Ind., 253; *Smith v. Bissell*, 2 Greene (Iowa), 379; *Grimmell v. Warren*, 21

BURROWS v. BANGS.

Iowa, 11; *Burlington v. Greene*, 22 *Iowa*, 508; *Lake v. Tyson*, 6 *N. Y.*, 461; *Youngs v. Stahelin*, 34 *N. Y.*, 258.

COOLEY, CH. J:

The important facts in this case are the following:

At the beginning of July, 1871, complainant was owner of real estate subject to certain incumbrances, among which was a mortgage of one thousand dollars, held by one Mrs. McGinnis. This mortgage was past due, but payment was not demanded. The mortgage year ended October 20th in each year. Being desirous to pay off these incumbrances, he entered into a negotiation with the defendant for a loan of two thousand dollars. It appears that one Latourette, a banker at Fenton, was indebted to defendant in the sum of several thousand dollars, and the money, if loaned, was expected to be obtained from him. Defendant called on Latourette, who informed him that he could not well pay two thousand dollars at that time, and inquired whether a part of that amount would not answer. Defendant on inquiry ascertained that Mrs. McGinnis did not care for her money before the mortgage year had expired, and he informed Latourette of this fact. It was finally arranged that Latourette should pay one thousand dollars at that time and give a certificate of deposit for another thousand, upon which the money should not be called for until October 20th following, when it would be needed to pay the McGinnis mortgage. What followed between these parties is shown by their testimony, which is here given.

Complainant testified: "Before the papers were made I went with Bangs to Latourette's bank, and Bangs informed Latourette that we were going to make the arrangement, and we then went to Smith's office to make the papers. I was to have the one thousand dollars then. I objected to giving the mortgage for two thousand dollars, not receiving but one thousand dollars. I proposed to give the mortgage for one

BURROWS v. BANGS.

thousand dollars then, and when I got the other one thousand, I would give a mortgage for that and put it all into one, for the reason that I did not want three thousand dollars against my place. Mr. Bangs said he would rather have it all in one mortgage, assuring me that the money would be paid at the time agreed upon, and Mr. Latourette was paying ten per cent. interest and it would balance the ten per cent. I was to pay him. Then, with that assurance, the mortgage was drawn for two thousand dollars. I then stated to Mr. Bangs that I wished him to leave the note and mortgage with Mr. Smith until the other one thousand dollars was paid. He was not inclined to do it. I then asked him to hold it from record until that one thousand dollars was paid, so that I might have the McGinnis mortgage and the other mortgage discharged; then the place would be clear and he would have the first mortgage. He did not make any reply to this. We then went together to the bank. Mr. Bangs said to Mr. Latourette: 'Mr. Burrows wants one thousand dollars now, as we talked, and the other as we had agreed upon.' Mr. Latourette gave to me or Bangs a certificate for one thousand dollars, being the amount to be paid down. Then Mr. Bangs said to Mr. Latourette: 'You are a man of large experience; how can this other thousand be fixed so that when it is paid it shall discharge the McGinnis mortgage?' and that he wanted the first mortgage on the place. Then Mr. Latourette said it could be a condition in the certificate of deposit that it was to pay the McGinnis mortgage, and nothing else. This one thousand dollars was to be paid the 20th of October, 1871. Mr. Latourette went on and made out the certificate of deposit, and Mr. Bangs took it and passed it over to me. As I took the certificate and stepped a little back from the counter, I saw Mr. T. G. Smith passing, and called him in, and he says, 'this only draws seven per cent.; I thought it was to draw ten per cent.' Smith said I had better have it put in; then it would be sure. I then called Mr. Latourette's attention to it and passed the certificate to him, and

BURROWS v. BANGS.

he wrote across the face of it, 'interest at ten per cent.,' and handed it back to me. I remarked that it was a strange way of doing business. It was said, and distinctly understood, that this one thousand dollars was not to be paid or called for until the 20th of October, 1871, and then was to be paid on the McGinnis mortgage, and was so expressly understood as between me and Mr. Bangs, or any body else. I did not accept this certificate as payment, and never agreed to receive it as payment. It was Mr. Bangs' suggestion that the last payment of one thousand dollars was put off to the 20th day of October. The reason the payment was put off to the 20th of October was because it was not convenient for Mr. Latourette to pay it before."

The following is a copy of the certificate:

"D. L. Latourette, successor of the First National Bank of Fenton, Michigan.

"FENTON, July 6, 1871.

"B. Bangs has deposited in this bank one thousand dollars, payable to the order of D. Burrows when Mrs. L. D. McGinnis shall discharge a certain mortgage on said Burrows' farm, on the return of this certificate. Interest ten per cent.

"\$1,000. (signed) D. L. LATOURETTE."

The testimony of Mr. Bangs was as follows:

"I made an arrangement to loan the complainant some money in July, 1871. I first had conversation in the early part of July that year. Complainant applied to me for the loan of two thousand dollars to be secured by a mortgage on his farm. I inquired in reference to any other incumbrance that might be on the place, and stated my unwillingness to loan the amount on his farm unless it was free from all incumbrances. I received this assurance, that although there was then a mortgage of six hundred dollars and another of one thousand dollars, it should be all cleared with this money he wished to loan of me. The six hundred dollar mortgage he said could be taken up very soon, or on the receipt of the money, or words to that purport.

BURROWS v. BANGS.

I am not positive as to the words used. Mr. Burrows said to me at one time in conversation, that Mrs. McGinnis asked him why he took money of Mr. Bangs and agreed to pay him ten per cent. interest, while that was all he was paying either before or after this. I went on after getting the conditions that have been testified to here, and we talked the matter over of loaning the money. Mr. Burrows and I went to the bank together and found Mr. Latourette there, and I made arrangements to loan complainant two thousand dollars at ten per cent. interest on a mortgage on his farm, being the mortgage in question. He was to receive four hundred dollars in cash and a deposit of six hundred dollars in the bank to remove the six hundred dollar mortgage, and a further deposit of one thousand dollars to remove the one thousand dollar mortgage. I paid him four hundred dollars, or Mr. Latourette did by my direction, and placed six hundred dollars more at his disposal to pay the six hundred dollar mortgage, and one thousand dollars more at his disposal, as conditioned in the certificate, being the certificate in question. As near as I can recollect, it was talked between Mr. Burrows and I that one thousand dollars, when it was drawn from the bank, should go to pay that McGinnis mortgage. This is the substance. Nothing was said about my retaining any interest in that thousand, only that it was to go to pay the McGinnis mortgage and to make my security good on the farm. At the time I went to the bank that day to get the money, Mr. Latourette owed me five thousand seven hundred and two dollars and sixty-six cents, including interest."

These statements, which were not materially varied on cross-examination, are sufficient to enable us to understand the transaction. Latourette failed October 9, 1871, and one or the other of these parties must lose the amount of the certificate referred to. Complainant has paid back the one thousand dollars received by him from defendant, with the interest thereon, and tendered to defendant the certificate, and now demands a discharge of his mortgage, on the ground

BURROWS v. BANGS.

that the certificate was never a payment to him, but only held by him to receive the money upon for Mr. Bangs when it should be paid, and apply it on the McGinnis mortgage; defendant, on the other hand, claims that the certificate was received by complainant as so much money, and was held by him at his own risk.

It is plain that there was no express agreement that complainant should receive the certificate as payment; but defendant insists that it is a fair inference from all the circumstances that such was the understanding, and he places some reliance upon the fact that he afterwards settled with Latourette on the basis of a credit to the latter for this sum, as showing that such was his own understanding. But this, we think, proves nothing, as Latourette should have been credited with the amount of the certificate while it was outstanding, no matter who owned it. He also showed an attempt by complainant to obtain payment of the certificate before October 20, 1871, as furnishing some evidence in the same direction; but this was just as consistent with one view as it was with the other. In short, we do not find any circumstances in the case which tend to throw light upon the understanding of the parties, except those which attended the original transaction.

And we think it is not a fair inference, from the original arrangement as detailed by the parties, that complainant was to receive the certificate, wait for payment upon it until the 20th of October following, and be himself at the risk of collection. The transaction appears to have been this: Complainant wanted the two thousand dollars to pay off certain debts. Defendant was willing to loan it to him, but could only obtain for the purpose one thousand dollars in cash and the paper of his debtor for another thousand, payable at a future day. Complainant could and did arrange so that this payment at a future day should answer his purpose. But nothing can be plainer than that it was not understood that the mortgage of defendant was to be a valid

BURROWS v. BANGS.

and effectual mortgage for the whole two thousand dollars from that time. Defendant had expressly declined to take a mortgage that should not be a first lien on the premises; and he could not obtain a first lien until the McGinnis mortgage was paid off. It was to pay this off that the last one thousand dollars was set aside, and defendant expressly refused to allow the transaction to assume any shape that should put the amount at the control of complainant. The amount was only to be paid when the McGinnis mortgage was paid off; the understanding being, that payment of this sum and satisfaction of the McGinnis mortgage were to be simultaneous acts; and it was by that payment that defendant was to obtain the first mortgage upon the premises, for which he had stipulated. Until that time, however, he had what he evidently regarded as equivalent; he had his mortgage for which he had paid one thousand dollars, subject to the McGinnis mortgage of one thousand dollars, and for the satisfaction of that he had made provision, so that its payment would give him the first lien for two thousand dollars. In effect, defendant said, "I will not take a mortgage of two thousand dollars subject to the mortgage to McGinnis; but I will take a mortgage for that nominal amount now, paying a thousand dollars of the consideration, and pay the remainder when I can obtain it to satisfy the McGinnis mortgage. When I make that payment, the McGinnis mortgage will be out of the way, and I will have a valid mortgage for the two thousand dollars, according to the understanding." This is what we think he meant by the original arrangement. Now, however, that the certificate has become uncollectible, he attempts to hold a mortgage of two thousand dollars subject to the McGinnis mortgage for one thousand dollars; which is precisely the lien which in the negotiations he declined to take, and which the complainant was equally unwilling to give.

We are of opinion that defendant's mortgage is satisfied.

But as there has been an honest difference between these

BURROWS v. BANGS.

parties regarding their rights, we do not think the defendant is subject to the statutory penalty for not discharging the mortgage.

The decree of the court below must be reversed, and decree be entered in this court declaring the mortgage satisfied. Complainant will recover the costs of both courts.

The other Justices concurred.

Daniel Stoflet v. Frederick Marker and another.

Declaration: Plea to the merits: Failure to state any cause of action. The objection that the declaration fails to state any cause of action is not waived by pleading to the merits instead of demurring; but the point may be made by an objection to the introduction of any evidence.

Pleading: General issue: Waiver: Technical defects: Substantial allegations. While the plea of the general issue waives technical and formal objections to the declaration, it does not waive the essential allegations of a cause of action.

Declaration: False representations: Statement of a cause of action. The declaration in this cause, which seeks a recovery of the amount of a note of a third person which it is claimed defendant passed to plaintiff under fraudulent representations as to its value, is held lacking in the substantial matters essential to make out such a cause of action, or any other.

Heard June 8. Decided June 20.

Error to Wayne Circuit.

Moore & Moore, for plaintiff in error.

Hamilton Baluss, for defendants in error.

GRAVES, J:

This action was brought originally in justice's court, and was thence taken by appeal to the circuit. The defendants

STOFLET v. MARKER.

in error, who were plaintiffs in the action, were allowed to recover, and complaint is made that there were several errors in the proceedings.

Among other objections, it is urged that the declaration (a copy of which is given below)* set forth no cause of action. The point was expressly made by an objection to the introduction of evidence at the beginning of the trial.

Counsel for defendants in error now insists that as there was no demurrer, but a plea to the merits, there was a waiver of all right to insist upon the defect.

*“The plaintiffs in cause complain of the said defendant, in an action upon contract for that whereas heretofore, to-wit: on or about the 15th day of September, A. D. 1874, the said defendant requested the said plaintiffs to sell said defendant one buggy of the value of one hundred and fifty dollars, and that said defendant represented that he had a good note against one Benjamin Cotton and L. W. Blakely, that he wanted to let the plaintiffs have in part payment of said buggy, and also represented to said plaintiffs the said Benjamin Cotton and L. W. Blakely were perfectly responsible for the amount of said note, and that they (the said plaintiffs) would have no trouble to collect the same, and as the said Benjamin Cotton and L. W. Blakely was perfectly responsible for the same, and said note would be paid at its maturity, to-wit: on the first day of December, A. D. 187—, and the said plaintiffs, relying upon the representations of the said defendant as to the solvency and responsibility of the said Benjamin Cotton and L. W. Blakely, the makers of said note, and that the same would be paid without trouble at maturity, let the said defendant have such buggy and took said note against said Benjamin Cotton and L. W. Blakely as part payment for said buggy, and that afterwards the said plaintiffs, and after the said note became due and payable, ascertained that said note was wholly worthless and that said Benjamin Cotton and L. W. Blakely was insolvent and irresponsible for the payment of said note, and the said plaintiffs demanded payment of said note of the makers, Benjamin Cotton and L. W. Blakely, and was refused payment by him, and that said note is now long past due and unpaid and the plaintiffs are powerless to collect the same of said Benjamin Cotton and L. W. Blakely, the makers thereof, and the said defendant well knew that said note was wholly worthless, and that the same would not be paid at maturity, and that said Benjamin Cotton and L. W. Blakely were entirely irresponsible for the payment thereof, whereby the said defendant became liable to pay and agreed to pay to the plaintiffs the amount of said note, to the damage of said plaintiffs of one hundred and fifty dollars, and they therefore bring their suit

“By HAMILTON BALUSS,
“their Attorney.

“Dated February 6th, 1875.”

STOFLET v. MARKER.

This is not so. The plaintiff in error was certainly entitled to object that there was no legal claim made against him, in substance or effect, to be answered. He was not bound to go into a controversy before a court and jury if he was not charged with any legal liability. Technical and formal matters were of course waived, but not such as were essential to show a cause of action of some kind. We must, then, look at the declaration, and on perusing it, it is difficult to ascertain whether the pleader intended to base his claim in tort or on contract. The action was, however, proceeded in on the part of the plaintiffs below on the assumption that Stoflet was charged with having made fraudulent representations to defendants in error concerning the goodness of a note against third persons which it is alleged he passed to defendants in error in part pay for a buggy, and their counsel now attempts to sustain the declaration as one framed to charge such a grievance.

Does it contain the substantial matters necessary to make out such a cause of action?

We think not. The note itself concerning which the representations are said to have been made is neither described nor sufficiently identified, and there is no allegation that the representations were not true at the time they were made, or any substantial allegation that as matter of fact they were untrue afterwards. In short the declaration fails to show in any way that the representations were untrue in point of fact, and hence fails to make out a charge of fraud. The pleading is so peculiar and ambiguous that it is not very easy to find out what of substance it contains. But it is plain enough that it does not contain the substance of a good declaration in tort.

The objection was well taken and should have been sustained. The other points become unimportant.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

ALBRIGHT v. COBB.

Sarah C. Albright v. William R. Cobb.

Vacant lands: Constructive possession: Mortgagor. The constructive possession of vacant lands, as between mortgagor and mortgagee, must be deemed to be in the mortgagor.

Mortgagee: Right of possession: Right of entry: Statute of limitations. The mortgagee of a mortgage given in 1839 in this state, had a right to take possession by way of security; but this was a mere right of entry and would be barred after twenty years.

Submitted on briefs June 8. Decided June 20.

Error to Livingston Circuit.

This is an action of ejectment, originally brought by Roswell Barnes against William R. Cobb. The plaintiff having died after issue joined, leaving Sarah C. Albright his sole heir at law him surviving, the latter was permitted to appear and prosecute the suit. The cause was tried by the court without a jury, and a written finding of facts was made and filed. Judgment was rendered for the defendant, and the plaintiff brought error.

H. H. Harmon, for plaintiff in error.

Dennis Shields and *Thomas F. Shields*, for defendant in error.

COOLEY, CH. J:

On the facts as found by the circuit judge the plaintiff was entitled to judgment.

Both parties claimed under Olney Hawkins, who was owner of the premises in 1839. On the 17th day of August in that year he mortgaged the land to Virgil Booth, to secure the payment of eleven hundred dollars in six months from that day. Subsequently he conveyed his equity of redemption to Robert D. Power, who died in March, 1861. His heirs at law conveyed to Roswell Barnes, who conveyed to the plaintiff. She thus became owner of the title, except as against any claim under the mortgage.

ALBRIGHT v. COBB.

Defendant claims under the Booth mortgage by an assignment from his administrators executed in 1863, he having died in 1859. The judge finds that some two hundred and fifty or three hundred dollars was paid on the mortgage, but he does not find when the payment was made. We cannot presume, in the absence of any finding, that it was not made at or near the time when the mortgage fell due. The mortgage must therefore have been assigned by Booth's administrators some twenty-three years or thereabouts after the mortgage became due, and after any payment upon it. The precise time when possession under the mortgage was taken was not found, but it was inferable that it was in 1863 or 1864.

Where lands are vacant, as was the case here when this possession was taken, the constructive possession, as between mortgagor and mortgagee, must be deemed to be in the former. The mortgagee of a mortgage given in this state in 1839 had a right to take possession by way of security.—*Mundy v. Monroe*, 1 Mich., 68. But this was a mere right of entry, and would be barred after twenty years.—*R. S. 1838*, p. 573; *Riopelle v. Gilman*, 23 Mich., 33. On the case as it stands, therefore, the entry of the defendant was unlawful. An examination of the other questions in the case seems not to be called for.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

Charles Lange v. Joseph Kaiser.

Practice: Evidence: Declining to rule on general offer to prove: Requiring questions to be put and ruled upon separately: Discretion. It is within the discretion of the trial judge to decline to rule upon broad and general statements of counsel as to what he offers and proposes to prove

LANGE v. KAISER.

and to require questions to be put to be passed upon separately in the usual and customary manner.

Charge to the jury: General exceptions: Several distinct propositions. A general exception to the charge to the jury is insufficient where the charge is not confined to a single question, but covers several distinct and separate matters; in such case the exception must be special and point out the specific matter complained of.

Labor performed: Implied promise to pay. Where one has employed another to manufacture articles at an agreed price out of materials to be furnished by the former, the fact that he himself, without request, assists in the manufacture, will not raise an implied promise on the part of the other party to pay for such services.

Submitted on briefs June 8. Decided June 20.

Error to Wayne Circuit.

Prentiss & Fox, for plaintiff in error, to the point that the law would imply a promise to pay for the labor performed by defendant for the plaintiff under the circumstances, cited: *Weston v. Davis*, 24 Me., 374; *Hertzog v. Hertzog*, 29 Penn. St., 465; *Abbott v. Herman*, 7 Greenl., 116; *James v. Bixby*, 11 Mass., 34; 7 Mich., 301; 8 Mich., 519.

Jackson & Wisner, for defendant in error.

MARSTON, J:

Kaiser brought assumpsit to recover a balance which he claimed to be due him for work and labor performed for Lange at his request.

I. After the plaintiff had introduced evidence tending to prove the amount due him, and had rested, the defendant was sworn and gave evidence in reference to certain payments. He also testified that on April 4, 1875, which was Sunday, he had some talk of settlement with plaintiff, when he was asked, "Did you pay him any money at that time?" This was objected to, whereupon defendant's attorney stated that he proposed to show that plaintiff received money on that day in full for the amount due him on his contract; that the balance claimed by plaintiff was paid him on that day. Thereupon the court stated to the attorney for defend-

LANGE v. KAISER.

ant, "I prefer you should ask your questions, and I will pass upon them;" to which the attorney for the defendant replied, "I have asked the question, and it has been passed upon. Now I suppose I have a right to state what I propose to show. It has always been customary to do that." The court again remarked, "I prefer you should ask the questions, and I will pass upon them separately." This defendant's attorney refused to do. The court sustained the objection, and counsel excepted.

While an offer made in this way frequently saves time which would otherwise be uselessly spent in attempting to prove facts considered by the court inadmissible, yet it is open to abuse, and it is clearly within the discretion of the court to refuse to permit counsel to make such an offer, and to insist upon the testimony being introduced or offered in the usual and customary manner. We think the course adopted by the court in this case was not only correct, but proper. The ruling of the court did not preclude defendant from proving just what he proposed to prove, but merely required him to proceed in the proper manner, by questioning the witness in reference to the alleged settlement. If counsel did not think proper to pursue this course, he cannot now be heard to complain.

II. There was no proper exception to the charge of the court upon which to base the fourth assignment of error. Had the charge been confined to a single question, then perhaps a general exception might, and probably would have been sufficient; but where the charge covers several distinct and separate matters, the exception should be special, and point out the particular matters complained of.

III. The work performed by plaintiff was the making of certain beer tubs out of materials furnished by defendant. Defendant gave evidence tending to prove that he assisted plaintiff in making the tubs. There was no evidence given by defendant tending to show that plaintiff had ever requested such assistance to be given, or that he had agreed to pay for the same. Now whatever the rule may

LANGE V. KAISER.

be as between strangers, where one performs valuable services for another, with his knowledge and assent, we think in cases like the present the relation existing between the parties precludes any implied promise to pay for such services, and that the charge of the court in this respect was correct.

IV. The court's explanation of defendant's third request to charge, as given, was proper, and could not have injured him.

There being no error, the judgment must be affirmed, with costs.

The other Justices concurred.

Francisco P. Woodruff and another v. Caleb Ives and another.

Log-lien law: Special proceedings: Construction: Affidavit. The proceedings under the log-lien law (*S. L. 1873, p. 466*) are special and must conform strictly to the statute; and the affidavit for attachment, therein provided for, is jurisdictional, and if it omits any material allegation which the statute requires, the writ will afford no protection to the officer executing it, and he will be guilty of conversion for seizing property upon it.

Log-lien law: Affidavit: Kind of services performed. An affidavit for such writ, which alleges that the plaintiffs performed labor upon the logs sought to be attached, but fails to specify the kind of labor or services performed, or to show that it was labor or services of the specific character prescribed by the statute, is fatally defective.

Jurisdictional defects: Appearance and plea to the merits: Waiver. And such a defect is not a mere irregularity that will be waived by the defendants appearing in the suit and pleading to the merits.

Submitted on briefs June 8. Decided June 20.

Error to Saginaw Circuit.

William H. Sweet, for plaintiffs in error.

D. W. Perkins, for defendants in error.

MARSTON, J:

Defendants in error brought trover to recover the value of certain pine saw logs converted by plaintiffs in error, who justified as sheriff and deputy sheriff of Saginaw county, under two certain writs of attachment issued out of the circuit court of said county commanding them to attach and safely keep the logs in question.

The plaintiffs in the attachment suits claimed a lien upon these logs, for work and labor performed thereon, under and by virtue of *Act No. 185 of the Sess. Laws of 1873, p. 466*, and the attachment was issued under the provisions of that act to enforce the lien.

The court instructed the jury that the affidavits attached to the writs were defective in not stating what kind of labor or services were performed by the plaintiffs in the writs, whether it was of that kind or character such as would entitle them to a lien upon the logs; that the officers had no authority therefore to seize the logs, and were guilty of a conversion in so doing.

Section 1 of the act referred to gives any person who may perform "any labor or services in falling, cutting, hauling, banking, driving or running any logs or timber in this state, a lien thereon for the amount due for such labor or services." The person claiming such lien is required to take certain steps for the purpose of keeping his lien in force, and within three months after filing his statement, he may enforce his lien by attachment against the logs. The proceedings and process in such cases shall, as near as may be applicable, follow the general statutes relating to attachments. The statute further provides that, before any attachment shall be executed, an affidavit shall be annexed thereto, setting forth the amount of indebtedness, as near as may be, over and above all legal set-offs; and such affidavit shall also show that the indebtedness is due for and on account of such labor and service on such logs or timber as entitles the plaintiff to a lien thereon; describing as particularly as may be the logs and timber."—§ 4.

WOODRUFF v. IVES.

The affidavits set forth that Perkins & Ives, the owners of the logs, employed Andrew Wendell to skid, haul and deliver these logs at West's mill, where they were delivered by said Wendell and then remained there; "that plaintiffs (in the attachment suits) were employed by and performed labor upon said logs for said Wendell in January, February and March, 1874; that there is now due to said plaintiffs, from said Wendell, for the labor performed by said plaintiffs as aforesaid, for the labor aforesaid, the sum of," etc. This is the only reference in the affidavits tending to show the kind of labor or service performed by the plaintiffs in the attachments upon the logs, and it utterly fails to show that they performed any labor or service on the logs which would entitle them to a lien thereon under the statute.

It was held in *Clark v. Adams*, 33 Mich., 159, that a party asserting this lien must be held to a strict compliance with the legal provisions in regard to the nature of the claim and the steps prescribed for the institution and perfection of the lien.

The proceedings in these cases under this act are special and must strictly follow the statute. The affidavit required by the statute is essential to confer upon the court or officer jurisdiction, and if it omits any material allegation which the statute requires it to contain, the officer would have no authority to execute the writ by seizing the logs, and should he do so he would be guilty of a conversion. The plaintiffs in the attachment suits might well have performed labor for Wendell upon said logs, and yet the labor not be of that kind which would give them a lien.

Nor do we think that the defendants in the attachment suits by appearing and pleading to the merits waived this question. It was not a mere irregularity which might be waived in this way.

The judgment must be affirmed, with costs.

The other Justices concurred.

STEPHENSON v. GRAND TRUNK R. W. CO.

George Stephenson v. The Grand Trunk Railway
Company of Canada.

Railroad fences: Destruction by fire: Repair: Unreasonable delay. A railroad fence being discovered on fire about six or seven o'clock in the evening, and the section foreman, getting notice thereof at about eight o'clock that evening, having proceeded the next morning before six o'clock to repair the same as soon as practicable from the nearest materials belonging to the company, which were about half a mile distant, it was held the company were not guilty of a breach of their duty under the statute, to repair the same without unreasonable delay.

Evidence: Reasonable diligence. In an action to charge a railroad company for want of reasonable diligence in repairing the fence destroyed under such circumstances, it is not error to exclude evidence that the repairs might have been more quickly made of suitable materials which were near at hand, but which it is conceded did not belong to the company, and which were not shown to have been available to it for that purpose.

Submitted on briefs June 9. Decided June 20.

Error to St. Clair Circuit.

C. R. Canfield and Mitchell & Avery, for plaintiff in error.

A. E. Chadwick and E. W. Meddaugh, for defendant in error.

GRAVES, J:

About six or seven o'clock in the evening of December 15, 1874, one Woolen, who was in the company service, in passing down the track, discovered that the company's fence along the premises of Stephenson was on fire. Three or four lengths had been burned, and he threw down and turned out two lengths to stop the fire. The fence was along a field which had been theretofore used as a pasture; but according to hearsay evidence, given on the part of Stephenson himself, no cattle were in sight. Woolen's employment was on a section of the road farther east, and it was no part of his duty to see to the fence where the

STEPHENSON V. GRAND TRUNK R. W. CO.

fire happened. He went, however, about eight o'clock the same evening and informed Mr. Guest, the foreman of the section, of the injury to the fence, and before six o'clock the next morning Mr. Guest proceeded to the spot, and after obtaining rails from a distance of half a mile, immediately repaired the fence. In case the company had had materials at hand, the reparation could have been made in a few minutes.

As it was, the place remained open for the space of a few hours only, and then during the night time in December. In this interval, however, plaintiff's cattle passed out and upon the track, and were killed by an engine. They were worth seventy dollars.

Plaintiff sued the company before a justice for the injury, and the case was subsequently removed to the circuit court by appeal. He rested his right there to recover upon the claim that the company did not use reasonable diligence under the circumstances in repairing the fence. No other fault was imputed. In adducing evidence to make out the want of diligence charged, he inquired of witnesses if there were not suitable materials near by, and how long it would have taken to repair the fence with those materials, but he virtually conceded at the same time that the materials referred to were not owned by the company. Under objection by the company, the court refused to allow the evidence unless the plaintiff would undertake to show the materials belonged to the company. The ruling was not objectionable. It was immaterial that suitable materials were at hand if they were not available to the company, and there was no pretense that such as were there were so available.

It was not suggested at all, that any were kept there for sale, or that such as were near by were procurable, and certainly the company were not to commit a trespass by appropriating the fencing stuff of others, in order to discharge the duty incumbent to rebuild without unreasonable delay.

The court charged substantially that there was no evi-

STEPHENSON v. GRAND TRUNK R. W. CO.

dence of unreasonable delay in rebuilding, and finally directed a verdict for the company. The jury so found.

It is unnecessary to repeat all the facts. The most material have been referred to, and the others do not help the plaintiff's case. Taken together they had no tendency to show negligent delay in rebuilding.

The judgment must be affirmed, with costs.

The other Justices concurred.

John McEwan v. Charles L. Ortman.

Written contracts: Party signing without reading. It can make no difference in the liability of a party under his written contract that he never read the contract, where it does not appear that he was deceived or misled as to its contents, or that he objected to its terms.

Promissory notes: Written contracts: Oral understanding. It is not competent in defense to a promissory note given for a part of the price named in a written contract for the purchase of lands, to show that the parties to the land contract had an oral arrangement at the time the note and contract were made, that the purchaser was to have the option of retaining the contract and paying the note, or surrendering the contract and thereby discharging his liability on the note; this would be to import into a written contract a verbal stipulation quite inconsistent with its terms.

Written instrument: Parol evidence. Such a case has no resemblance to those in which parol evidence is admitted to explain the purposes for which property has been transferred as a security by a conveyance absolute on its face.

Statute of frauds: Parol contract: Written instrument. But, moreover, such a stipulation as was here sought to be shown would be void under the statute of frauds unless in writing, so that the offer was not merely to show by parol a change in the terms of a written contract, but to show such an agreement as could not under any circumstances have been made by parol.

Land contracts: Agreement to surrender or release parcel: Defeasance: Resale: Statute of frauds. An agreement to surrender or release a parcel of land mentioned in a contemporaneous contract is not a defeasance, but an agreement for a resale, and as clearly within the statute of frauds as an agreement to transfer any other parcel.

Heard June 9. Decided June 20.

Error to Bay Circuit.

MCEWAN v. ORTMAN.

Holmes, Collins & Stoddard, for plaintiff in error.

John J. Wheeler, for defendant in error.

CAMPBELL, J:

Ortman recovered in the court below on a promissory note made by McEwan. The latter complains, on error, that a valid defense was excluded. The defense there relied on was, that at the time of giving the note, in renewal of which the note in suit was made, it was a matter of pure accommodation, and that at the same time, at Ortman's request, McEwan signed a land contract for the purchase from Ortman and one William Boeing, of a tract of land for which the purchase price was six thousand dollars, the first installment of fifteen hundred dollars being in the contract declared to have been paid by the note in question. On the trial McEwan sought to show the following facts, as set forth in the assignment of error, viz.:

"That before the commencement of this suit, and after the defendant had signed the instrument or indorsement upon the back of said contract, bearing date the 25th day of August, 1875 [which was an indorsement by McEwan surrendering the contract], that he, the defendant, took and tendered it to Mr. Ortman; that the defendant had never any possession, use, control, or profit of the land mentioned in the contract; that when Mr. Ortman met the defendant as stated in the evidence the contract had already been prepared by him; that it never was read by the defendant at the time it was signed; that he didn't know its contents, and relied upon the statement of the plaintiff that he might take the contract and hold it, and that if he desired to return the contract, that he (the plaintiff) would take care of and pay the note, and that this stipulation in relation to the surrender and return of the contract was not in the written contract, it having been prepared before Mr. Ortman

MCEWAN v. ORTMAN.

went there; that this agreement was really a part of the contract under which the note was made and delivered." The court refused to receive the evidence.

It can make no difference whether McEwan did or did not read the contract. He does not claim that he was deceived as to its contents by any art or device, neither did he object to its terms. The real defense insisted on is, that he and Ortman had a verbal agreement when the note was made that McEwan should have the option of retaining the contract and paying the note, or surrendering the contract and requiring Ortman to pay it.

Upon this hypothesis the transaction was not one in which the land was in any sense transferred to McEwan by way of security. It was simply a purchase, which he might retain or give up at his option. The case has no resemblance to those in which parol evidence is admitted to explain the purposes for which property has been transferred as a security by a conveyance absolute on its face. The attempt here is to import into a written contract a verbal stipulation quite inconsistent with its terms. By the contract the land was to belong to McEwan not by way of security, but in his own right. It was to belong to him, by the verbal stipulation, until he should see fit to surrender (or more properly re-transfer) it. If it had been a security the option would have been with Ortman as mortgagor, and not with McEwan. Under the statute of frauds such a stipulation would be void unless in writing, and the offer was not merely to show by parol a change in the terms of a written contract, but to show such an agreement as could not have been made by parol under any circumstances. The surrender was meant to release an equitable estate in fee simple, and an agreement for such a purpose cannot be made except by an instrument in writing signed by the party releasing or transferring it. A verbal agreement to transfer any other parcel of land would be no more contrary to the statute than one to release or surrender a parcel men-

MCEWAN v. ORTMAN.

tioned in a contemporaneous contract. And such an agreement is not a defeasance, but an agreement for a resale.

We think the court decided correctly. The judgment must be affirmed, with costs.

The other Justices concurred.

Osmond Tower v. The Detroit, Lansing & Lake Michigan Railroad Company.

Aid to railroad: Contract: Consideration: Evidence: Preliminary negotiations: Discretion. In an action upon a contract promising to pay a specified amount upon the completion of a certain railroad, where the declaration avers the contract to have been made for a valuable consideration, and the antecedent negotiations out of which the contract grew are relied upon as constituting such consideration, it is not error to allow such preliminary negotiations to be very fully disclosed, and a wide discretion in that regard must be left with the trial judge.

Evidence: Opinions: Inquiries not susceptible of direct answer. An inquiry put to a laborer on the railroad, as to the number of persons ordinarily required on a completed road to keep in repair a specified distance of the line, is held to have been properly overruled; the witness was not shown to be competent to express an opinion on the subject, and moreover the inquiry is not susceptible of a direct answer, as there is and can be no general rule on the subject.

Finding of facts: Questions of fact: Practice. The finding of the circuit judge, upon a trial by the court without a jury, is conclusive upon every question of fact specifically passed upon.

Finding of facts: Evidence: Reasons: Review: Practice. It is not error (though not a commendable practice) for the judge's finding to embrace some of the evidence and to state the reasons which brought him to his conclusions; but this will not enable the court of review to weigh the evidence or to pass upon the soundness of the reasoning given.

Promise in aid of railroad: Completion of road: Condition: Performance: Construction. A finding that the condition of the contract in suit was performed "as the parties should be understood to have intended," and that the condition "ought to be held performed," is equivalent to a finding that it was performed according to the intent of the parties, or according to its legal effect.

Contracts: Construction: Aid to railroad: Completion of road. A ruling that the word "completed" in such a contract as the one in suit here has a different meaning from that it has in a contract for the construction of the road, is held not error; the purpose of such a condition, when embodied in a contract made in aid of the road, is accomplished when the road is put in a condition for regular business.

TOWER v. DETROIT, L. & L. M. R. R. Co.

Interest: Happening of a specified event: Notice: Performance of condition.
An allowance of interest according to the terms of the contract is not erroneous, though there was no showing of notice to defendant that the condition of the contract had been performed.

Heard June 9. Decided June 20.

Error to Ionia Circuit.

Lemuel Clute, for plaintiff in error.

Blanchard & Bell and *G. V. N. Lothrop*, for defendant in error, to the point that the performance or completion contemplated by a contract is such only as is required by the true spirit and meaning of the contract and the intention of the parties as therein expressed, cited: 2 *Pars. Cont.*, 656; *O'Neal v. Henry*, 3 *Jones, Law*, 517; that where a party stipulates to do a certain thing in a certain specified event which may become known to him, or with which he can make himself acquainted, and which does not lie within the peculiar knowledge of the opposite party, he is not entitled to notice of the happening of the event unless he stipulates for it.—*Vyse v. Wakefield*, 6 *M. & W.*, 452; *Douglass v. Howland*, 24 *Wend.*, 48; *Breedlove v. M. & F. R. R. Co.*, 12 *Ind.*, 114.

COOLEY, CH. J:

The facts in this case are very fully set out in the finding of the circuit judge, as follows:

“This suit is brought to recover the amount claimed to be due on a certain contract made by the defendant, a copy of which reads as follows, to-wit:

“\$1,000.

“‘For value received, I promise to pay to the order of H. H. Smith one thousand dollars, one year after the completion of the proposed Ionia, Stanton & Northern Railroad to Sheridan, in Montcalm county, from its junction with the Detroit, Lansing & Lake Michigan Railroad; provided

TOWER v. DETROIT, L. & L. M. R. R. CO.

said railroad be completed to Stanton May 1, 1873. Interest on the note at seven per cent. after the completion of the said railroad to Sheridan.

“‘Dated Ionia, July 20, 1872.

“‘(Signed)

OSMOND TOWER.’

“From the testimony I find the facts in the case to be as follows, to-wit:

“The Detroit, Lansing & Lake Michigan Railroad Company was duly organized under the laws of this state in the year A. D. —, and has been doing business in the exercise of the privileges of its charter since.

“In 1871 and 1872 there was a project under discussion for the building of a branch road from plaintiff's line at the city of Greenville to the village of Stanton.

“The citizens of Ionia preferred and advocated the building of a branch from Ionia to Stanton some time in the summer of the latter year, 1872. The citizens of Ionia, Sheridan and Stanton received assurances from James F. Joy, through Mr. H. H. Smith, that if they would raise forty-five thousand dollars, and procure the right of way, the road should be built from the plaintiff's road near Ionia, within three or four miles, north to Stanton. At this time, and during the years 1872 and 1873, H. H. Smith was the president of the Detroit, Lansing & Lake Michigan Railroad Co. Mr. Joy was one of its directors, also president of the Michigan Central Railroad Co., and represented Boston capitalists interested in both roads. A subscription paper was drawn up and circulated for the purpose of raising the money, and steps were taken to secure the right of way. Mr. Tower, the defendant, Mr. Stanton, Mr. Bell, Mr. Page, and others, were active in the circulation of the subscription paper, and in the procuring of the right of way. Mr. Tower subscribed, in the name of ‘O. Tower and Son,’ one thousand dollars. About forty thousand dollars were raised by subscription. Page & Wilson gave their bond that the balance should be subscribed or paid. Mr. Page, Mr. Stanton and

TOWER v. DETROIT, L. & L. M. R. R. Co.

others, gave their bond that the right of way should be procured.

"On the 16th of July, 1872, the subscribers met and duly organized under the laws of this state, 'The Ionia, Stanton & Northern Railroad Company.' Its route was from its junction with the Detroit, Lansing & Lake Michigan Railroad, at a point three or four miles northerly from Ionia, to Sheridan and Stanton. Mr. Tower was present and took part in its organization.

"Mr. H. H. Smith was duly elected president of the new company, and acted as such till its consolidation under the laws of this state with the Detroit, Lansing & Lake Michigan Railroad Co., some time in December, 1872. Under articles of consolidation the name Detroit, Lansing & Lake Michigan Railroad Co. was retained. Mr. Smith remained as president, and was the active managing man in the building of the Stanton branch.

"The subscription paper was circulated prior and subsequent to the organization of July 16th, and notes or contracts executed and handed over to the person or persons having the paper in charge in adjustment of subscriptions.

"On the 20th of July, 1872, Mr. Tower executed this note or contract, and handed it over in the same way, and in adjustment of his subscription.

"On the 25th of July, 1872, Mr. Page, Mr. Stanton and others, went into Detroit and had an interview with Mr. Joy and Mr. Smith for the purpose of closing the arrangements for building the road. The whole matter was closed up at that interview, or soon after. The notes or contracts taken upon subscriptions, the bond of Page and Wilson for the balance of the forty-five thousand dollars, and the bond of Page, Stanton and others for the right of way were handed over and contracts entered into for the building of the road. Mr. Tower's note or contract was among those that were handed over.

"Mr. H. H. Smith, the payee named therein, endorsed.

TOWER v. DETROIT, L. & L. M. R. R. Co.

and delivered same to the plaintiff. The endorsement was in words and letters following, to wit:

“‘Pay to the order of D., L. & L. M. R. R. Co. without recourse.’

“‘[Signed]

H. H. SMITH.’

“The letters ‘D., L. & L. M. R. R. Co.’ are the initials and stand for ‘the Detroit, Lansing, & Lake Michigan Railroad Company.’

“Mr. Tower knew the object of his subscription, that it was to aid in building the road from Ionia to Stanton; he knew of Mr. Joy’s proposition, and that this note or contract was to be used as part of amount, to be used if whole amount was raised. Such was his testimony.

“Mr. Tower did not go to Detroit on the 25th of July with Mr. Page, Stanton and others, but he authorized them to go and make arrangements for building the road.

“The contract for grading, ready for the ties, was taken by Page & Wilson. They commenced at the Junction and worked north, finishing about the first of January, 1873.

“Trains commenced running regularly over the road from Sheridan to Ionia on the 16th of December, 1872, and over the entire line from Stanton to Ionia on the 28th of April, 1873, and have continued so to run since, except during the snow blockade in the winter of 1874-5,—heavy mixed trains with a passenger coach attached. Time tables were published and posted at those dates. No fences had been built, and no turn tables at either Sheridan or Stanton.

“Upon the trial, one Peter Larsen, an employé of the plaintiff, was introduced by the defendant as a witness in his behalf, and was duly sworn and testified as to matters touching the completion of the road. The attorneys of the respective parties admitted that the facts were in accordance with his testimony, and the court so finds. This testimony was as follows, to-wit:

“‘My name is Peter Larsen. I reside in Stanton; have for two years; worked on said road; began March 20, 1873;

TOWER v. DETROIT, L. & L. M. R. R. CO.

worked for six months between Stanton and Sheridan until middle of August; in March, when I began work, the ties rested on blocks; there were twenty or twenty-five men on lifting gang, and twenty to twenty-five men on gravel train; in April, thirty to thirty-five men on each train; in May, about thirty-five men on each train; in June, forty to forty-five men on each train; in July, fifty to fifty-five men on each train; the lifting gang first pulled out blocks, and put gravel under, and did this to first of May; after that we went over four or five times; the ground settled; when we went over the first time we pulled out the blocks (from under ends of ties) and put in gravel; we filled in under ends of ties, and between ends of ties, so as to bring to line; we used the gravel under ends of ties, and as far towards center of track as to be inside of rails, and between ends of ties to make solid; and when gravel enough, all the way under ties, but frequently not gravel enough, and there would be spaces under the middle of ties not filled, and between middle of ties; this the first time; we leveled the track the best we could the first time, then we went over after this four or five times, filling in more and lifting track where settled, etc.; made the track the best we could the first time, but could not make it level; in May I lifted, carried the level, and in June and July we worked over time; I put in thirty-five days in June, and so did other men; we raised the track every time we went over it; the last time we went over we only raised where there were sink holes; when we left the track in August we had ballasted up to top of ties.'

"Cross-examination—"When we went over first time we brought to a line as well as we could, but it would settle of itself, and by running of trains it settled more or less; we leveled as well as we could; comparatively level, but not as level as an old track. In graveling we put in more gravel where it was soft and wet; we graveled all the way; we lifted and graveled every time; I have worked on railroads; this business two years. When we went over second time

TOWER V. DETROIT, L. & L. M. R. R. Co.

we lifted up every tie, some more than others, and in some places put in more dirt than others. Between first and second time over it settled some all along, but more in swamp holes than other places, leaving track uneven. We went over the second time to make it level. Between second and third times it settled, but not so much, not much in cuts. Settled on embankments more than in cuts. Settled first time graveling in cuts, but not after first time.'

"Redirect examination—'The last time over we filled in and leveled between center of ties. Had before that done it where there was gravel enough. Six miles from Sheridan to Stanton.'

"During the trial of this cause and at its close, by the written request of the respective parties hereto attached, and marked exhibit 'A' and 'B,' the attention of the court was called to the testimony upon three points: *first*, as touching the question of consideration; *second*, as to the question of delivery; and, *third*, as to completion of road to Stanton May 1, 1873.

"And the attention of the court was also called to certain propositions of law supposed to be of importance in the decision of the case.

"Upon the first and second points there cannot, we think, be any difficulty. The defendant and other citizens of Ionia, Sheridan and Stanton were in favor of and took an interest in the building of this road; a proposition was made to them by Mr. Joy to build the road if they would raise forty-five thousand dollars and procure the right of way. A subscription paper was drawn up for the purpose of raising the amount; the defendant signed the same in the name of his firm in the sum of one thousand dollars; he assisted in the circulation of the paper, in procuring the right of way, and in the organization of the company; he gave the note or contract in suit in adjustment of his subscription; he authorized the acceptance of the proposition and the closing of the contract for building the road, and the use of his note or contract in doing so; all the arrange-

TOWER V. DETROIT, L. & L. M. R. R. Co.

ments were perfected, his note or contract used, and the road built. Under the circumstances the defendant cannot, as it seems to us, raise any question as to the consideration or delivery.

“As to these points, we think the case is fairly and justly with the plaintiff.

“As to the third point, the completion of the road, we find that the defendant's note or contract contains the following words, to-wit: ‘Provided said railroad be completed to Stanton May 1, 1873.’ The question of liability turns on this proviso. Confessedly the contract was to pay one thousand dollars to aid in the construction of the road then contemplated. Two days before the 1st of May, 1873, the road was a continuous one, over which heavy trains were running daily to Stanton; so that there was a road bed, ties in place, and rails down continuously, and in such condition as to justify and secure traffic over the road, and this is a compliance with the condition or proviso, viz.: ‘Be completed to Stanton May 1, 1873,’ as the parties should be understood to have intended. To give construction to the contract, the court must occupy the standpoint of the parties at the making of the instrument. The defendant had no interest in the question whether the last spike was driven and the last shovel of ballast deposited by May 1st, but he had a purpose and interest to have a railroad over which trains could pass safely and freely, conveying passengers and freight. What novice does not know that road beds settle, and continue to settle for some time after trains begin to run, especially if the bed has been recently built? It should be noticed that most of the work had been done in the winter; that there were low and wet places upon the line, and that trains commenced running as the ground was thawing out, and in the season of showers. Can it be supposed that the parties contemplated that the road bed should be settled to its permanent place, and that the road should be in all respects completed as a first class railroad? The fact is, looking to the contracting parties and the object of the

TOWER V. DETROIT, L. & L. M. R. R. Co.

contract, they could have been governed by no such considerations. The true rule, in the absence of specifications as to the mode and manner of completion, is, that the road should be substantially, and to all intents and purposes, a railroad in good condition for the passage of freight and other trains with safety. The testimony shows that such was the condition of this road between the Junction and Sheridan on the 16th of December, 1872, and between the Junction and Stanton on the 28th of April, 1873. Such being the facts, the condition in the contract ought to be held performed.

“The difficulty upon the part of the plaintiff is this, he would have the contract examined and passed upon as though between the plaintiff and a contractor. In such a case the words ‘be completed,’ would clearly import a permanent finishing up. A court would so hold, looking at the object sought to be accomplished and the intention of the parties, as gathered from the contract and its subject matter. But this is a case where suit is brought upon a contract given by way of a subscription to aid in building a railroad. Still the rule of construction is the same. The court must look at the intention of the parties from the contract and its subject matter, and the purpose for which it was evidently made.

“Upon this contract, and between these parties, we find the true rule to be as heretofore stated. Any other view would defeat a recovery if one spike was not driven, one tie settled out of line, one rail out of place.

“There is due upon this contract, at this date, the sum of eleven hundred and eighty three and seventy-four one hundredths dollars [\$1,183.74].”

On the trial the plaintiff was allowed to go very fully into evidence of the preliminary negotiations which finally resulted in the giving of the contract in suit, and several objections made by the defendant to the admission of such evidence were overruled. As the declaration only averred that the contract was made for a valuable consideration, and

TOWER v. DETROIT, L. & L. M. R. R. Co.

the antecedent negotiations were relied upon as constituting such a consideration, it was very proper to allow them to be very fully disclosed, and nice rules for the reception and exclusion of evidence in such cases would be difficult to prescribe and mischievous in practice. We are not satisfied that the court exceeded the limits of a reasonable discretion in any of its rulings, and if the relevancy of some of the evidence is not very apparent, it is certain that it was not of a nature to prejudice Mr. Tower in any way.

We are of opinion also, that the court did not err in overruling the inquiry put to the witness Larsen, who was a laborer on the road, regarding the number of persons ordinarily required on a completed road to keep in repair a specified distance of the line. The witness was not shown to be competent to express an opinion on the subject; and moreover the inquiry was not susceptible of a direct answer; there is, and can be, no general rule on the subject. The nature of the road bed and superstructure, the character of the country through which it runs, the number of trains passing over the road; these and many other circumstances are so essentially and radically different in the case of different roads as to render such a question incapable of answer, and to justify its exclusion on that ground.

The main controversy in the case related to the question whether the road was actually completed within the stipulated time. This was a question of fact, and if it has been specifically passed upon by the circuit judge, we must be concluded by his finding. The plaintiff in error insists that the finding is not specific upon the point; and that is one of the errors relied upon for reversing the judgment.

A careful examination of the finding renders it apparent that the judge has not drawn it up in the usual form, confining it strictly to the facts deduced from the evidence; but that he has set forth some portion of the evidence, and has also stated, in part at least, the reasons which have brought him to his conclusions. There is no error in this, though the practice is likely to lead to questions such as are

TOWER v. DETROIT, L. & L. M. R. R. Co.

raised in this case, as to what are and what are not the facts actually found. Only with these has the court of review any concern; it cannot weigh the evidence, nor pass upon the soundness or unsoundness of the judge's reasoning. Our duty on this part of the case is confined to the one question, whether the facts found make out a cause of action; if they do, and there are no errors in other parts of the record, the judgment must be supported.

The judge finds that the condition of the contract was performed "as the parties should be understood to have intended." In another part of the finding he says that "the condition in the contract ought to be held performed." With these statements are given the judge's reasoning; but with that, as before stated, we have nothing to do. Had the judge limited himself to the specific statement that the condition of the contract was performed, or that the road was completed within the time specified in the contract, there could have been no doubt of its sufficiency. The question now is, whether what he has said is equivalent in substance; and we are compelled to say that we think it is. His finding in substance is, that the condition of the contract was performed according to the intent of the parties; and that is the same as saying that it was performed according to its legal effect.

Exception is taken to the judge's remark that the word "completed," when made use of in such a contract, may have a different meaning from what it would have in a contract for the construction of the road; but in this he was doubtless correct. In a contract for construction it would mean a completion in accordance with specifications; but in a contract like the one in suit it is not likely the parties have any such exact completion in mind, and a less perfect construction may satisfy its intent, provided the road is in condition to be opened for regular passenger and freight traffic, and is actually in use. The purpose of such a condition, when embodied in a contract made in aid of the road, is accomplished when the road is thus put in condi-

TOWER v. DETROIT, L. & L. M. R. R. CO.

tion for regular business; and nothing in the finding on this point appears to us erroneous.

It is insisted that the court erred in allowing interest on the contract before notice to Tower that the condition had been performed. The allowance, however, was in accordance with the terms of the contract, and we find no error in it. And a careful examination of the record discloses no other ruling that seems to require special notice. The general principles that must govern contracts of this nature have been so fully considered by us in previous cases that we think it unnecessary to do more than to refer to them.— See *Underwood v. Waldron*, 12 Mich., 73; *Comstock v. Howd*, 15 Mich., 237; *Stevens v. Corbitt*, 33 Mich., 458; and *Michigan Midland & C. R. R. Co. v. Bacon*, *Ibid.*, 466.

The judgment must be affirmed, with costs.

The other Justices concurred.

The People v. John Brown.

Bigamy: Void second marriage: Marriage of negro and white woman. It is no defense to a charge of bigamy that the second marriage was one between a negro and a white woman, which is prohibited and made void by statute; for every bigamous marriage is void.

Bigamy: Gist of the offense: Two elements of illegality. It is the entering into the void marriage while a prior valid marriage exists, that constitutes the gist of the offense; and it cannot help matters any that there are two elements of illegality in the case, instead of one. It is no valid reason for relieving a person from the consequences of violating one statute, that the act of doing so violated also another.

Submitted on briefs June 13. Decided June 20.

Exceptions from Recorder's Court of Detroit.

A. J. Smith, Attorney General, for the People, argued that a bigamous marriage is always void; that no man can

PEOPLE v. BROWN.

lawfully marry when he is already married; that the gist of the offense is the going through the ceremony of marriage and living with the woman as if married when the party is already lawfully married; that the violation of two statutes does not relieve from liability under either; that two wrongs do not make a right; that even where the second marriage is incestuous the offender is nevertheless liable for bigamy.—*Bishop on Stat. Cr.*, § 590-2, and note 1; *Rez v. Penson*, 5 C. & P., 412; *Reg. v. Brawn*, 1 C. & K., 144; *Hayes v. People*, 5 Parker, 325; *Roscoe Cr. Ev.*, 309-10; 2 *Bishop Cr. L.*, § 1025.

James H. Garlock, for respondent, to the point that to sustain a conviction for bigamy the second marriage must have been such a one as would have been in all respects legal and valid except for the fact that the defendant then had a former wife living, cited: 3 *Green. Ev.*, § 205; *Bishop on Stat. Cr.*, § 592; *Reg. v. Fanning*, 17 *Irish C. L.*, 289; 10 *Cox C. C.*, 411; *Burt v. Burt*, 2 *Swaby & Tristram*, 88; *Carmichael v. State*, 12 *Ohio St.*, 554; *Hayes v. People*, 25 *N. Y.*, 398; *Reg. v. Miller*, 10 *Cl. & F.*, 689.

COOLEY, CH. J:

The defendant seeks to avoid the penalties of a bigamous marriage by showing that he is a negro, and that the other party to the marriage was a white woman, with whom under the statute it was impossible for him to contract marriage at all.—*Comp. L.*, § 4724. The argument is, that if the ceremony of marriage has taken place between parties who, if single, would be incapable of contracting marriage, the marriage ceremony is merely idle and void, and the respondent cannot be said to have been married the second time at all.

The logic of the argument is not very obvious. It certainly cannot be based upon any idea that there must be something of binding and obligatory force in the second

PEOPLE v. BROWN.

marriage; for every bigamous marriage is void, and it is the entering into the void marriage while a valid marriage exists that the statute punishes. Nor can we understand of what importance it can be that there are two elements of illegality in the case instead of one, or why the party should be relieved from the consequences of violating one statute because the act of doing so was a violation of another also.

The authorities sanction no such doctrine. There are loose statements in some of the cases that the second marriage must have been one that, but for the existence of the first, would have been valid; but these evidently relate to the acts and intent of the parties, and not to the legal ability to unite in a valid relation. It was decided in *Rex v. Penson*, 5 C. & P., 412, that bigamy was committed in marrying a woman under an assumed name, though by law such a marriage between persons capable of contracting would be void. The case of *Regina v. Brown*, 1 C. & K., 144, was similar to the present in its facts, and Lord Denman in summing up said: "It is the appearing to contract a second marriage, and the going through the ceremony, which constitutes the crime of bigamy, otherwise it never could exist in ordinary cases, as a previous marriage always renders null and void a marriage that is celebrated afterwards by either of the parties during the lifetime of the other. Whether therefore the marriage of the two prisoners was or was not in itself prohibited, and therefore null and void, does not signify, for the woman, having a husband then alive, has committed the crime of bigamy, by doing all that in her lay by entering into marriage with another man." These cases are recognized in the case of *Hayes v. People*, 25 N. Y., 390, which is relied upon by the respondent, but which affords no countenance for his exceptions.

The recorder's court must be advised that we find no error in the record, and that judgment should be pronounced on the verdict.

The other Justices concurred.

FARWELL v. JOHNSTON.

Elizabeth Farwell v. John Johnston and another.

Equity pleading: Allegation of consideration: General demurrer. On general demurrer to a bill in equity, general allegations of matters merely going to make up a completed consideration are good enough, though it is more correct pleading to set them out specifically.

Consideration: Release by wife: Dower: Homestead. A release by a wife of a dower and homestead interest is a valuable consideration and sufficient to support a lawful contract.

Contracts: Statute of frauds: Performance. A contract to convey a parcel of land to a wife, in consideration of her joining her husband in a deed of a homestead, and thereby releasing her dower and homestead rights, is held taken out of the statute of frauds by performance, when the deed has been fully executed and delivered.

Equity pleading: Specific performance: Bona fide purchaser: Demurrer. A bill by the wife for specific performance of such a contract, to which a third person, to whom defendant has conveyed, is made a party, which avers that complainant is in possession, and indirectly that such third person knew her equities, is not open on general demurrer to the objection that it fails to allege that he lacked the qualities of a *bona fide* purchaser.

Specific performance: Bill of complaint: Prayer: Compensation. A bill which prays for specific performance as the primary remedy and for compensation as alternative relief merely, is not subject to the objection that it is filed for compensation only.

Heard June 14. Decided June 20.

Appeal in Chancery from St. Clair Circuit.

Chadwick & Voorheis, for complainant.

B. C. Farrand and *C. R. Brown*, for defendants.

CAMPBELL, J:

Complainant filed her bill for the specific performance of an agreement whereby, in consideration of her release of a dower and homestead right by a deed which she made with her husband to the defendant Johnston, he agreed to convey to her a parcel of two acres, after the title to his purchase was cleared of certain incumbrances, which the bill avers to have been done. Graham is made a defendant by reason of an alleged conveyance to him by Johnston.

FARWELL v. JOHNSTON.

A demurrer was put in, setting out four grounds: *first*, want of jurisdiction; *second*, remedy at law; *third*, that Graham is not averred to be a purchaser in bad faith; *fourth*, that the bill is only filed to obtain compensation.

The principal defense is that of the statute of frauds. It is claimed the only written document relied on is not a complete and clear contract, and that no verbal arrangements are valid. It is also claimed the contract has no sufficient consideration.

The writing was as follows:

“PORT HURON, MICH., October 15, 1873.

“B. C. Farrand, Esq: I agree to give Mrs. Farwell two acres of land for herself, and settle up the entire thereof when the abstract is made perfect according to the understanding.

“JOHN JOHNSTON.

“Two acres to be from southeast corner to school-house.

“J. J.”

The bill does not aver this writing to have been the contract, which is set up independently; and the object of this document was, as appears from the bill, as a part of the consideration of complainant's signing her own deed, but not the whole consideration. It is not set forth as a contract between Johnston and complainant, and may be assumed to have been one of the assurances which she desired to have in the hands of some reputable third person.

The contract itself is set out plainly enough in the bill, except that it does not describe specifically the particular mortgages which were to be discharged before she would be entitled to her two acres. They are, however, averred to have been discharged long since by a decree in chancery, and there is no ground of demurrer alleged for want of a more specific description. On general demurrer such allegations of matters merely going to make up a completed consideration are good enough, although it would have been more correct pleading if they had been set out more specifically.

FARWELL v. JOHNSTON.

The objection for want of consideration is without any foundation. It has always been held that a release by a wife of an interest which was within her own option to release or not—as, for example, a right of dower—is a valuable consideration, which will support a post nuptial settlement, and therefore will suffice for any other purpose. This is elementary law, and was never disputed.

As this contract was partly performed by the conveyance which Mr. and Mrs. Farwell executed at the outset, this part performance being nearly the entire substance of the consideration, and one which put the parties where they cannot be restored in *statu quo*, by depriving them of their homestead, the case is thereby taken out of the statute of frauds.

The objection that Graham is not alleged to have lacked the qualities of a *bona fide* purchaser, is equally untenable. It is positively averred that complainant was in possession, which would give him presumptively constructive notice of her rights, and there is an indirect averment that he knew her equities. Perhaps a special demurrer might have compelled an amendment putting the averments in a better form, but they are good on general demurrer.

The objection that the bill is filed merely for compensation, is incorrect. It prays compensation only as alternative relief, and this is proper. It prays specific performance as the primary remedy.

The demurrer should have been overruled. The decree below must be reversed and the demurrer overruled, with costs of both courts, and the cause remanded for further proceedings, with leave to the complainant to amend if she desires to do so.

The other Justices concurred.

ROGERS v. PEOPLE.

Rodney Rogers v. The People.

Rape: Resistance: Cross-examination of prosecutrix. On the trial of a charge of rape, where the case turns almost wholly upon the testimony of the prosecutrix, a wide latitude should be allowed on cross-examination as to facts having a legitimate bearing on the question whether the act imputed to defendant was against her will; and where the proofs were not very decided upon the fact of resistance, it was held error to exclude inquiries on cross-examination as to whether the prosecutrix voluntarily made statements of the transaction, and whether she prosecuted the defendant of her own motion or at the instigation of others.

Heard June 14. Decided June 20.

Error to St. Clair Circuit.

Chadwick & Voorheis, for plaintiff in error.

Andrew J. Smith, Attorney General, for the People.

GRAVES, J:

Plaintiff in error was convicted of the crime of rape upon Rachel Betten, a girl about eighteen years old. The offense was alleged to have been committed in January, 1875, near Mill Creek, in St. Clair county, and the testimony tended to show that it was in the woods near the road, and in plain view of it. She swore that in passing along the highway from a place called Ruby, towards her father's house, she fell in with defendant, and walked and conversed with him; that he insisted on carrying an oil can she had with her, and asked her to go into the woods to see an animal he said he had trapped; that she declined to go into the woods with him, and he caught her and took her in and then outraged her; that the act was committed about three o'clock in the afternoon, and that immediately after its perpetration he left her and she went on to her father's; that on the way she stopped at the first house, being that of Mr. Welch, and then informed Mrs. Welch part of what had occurred. It

ROGERS v. PEOPLE.

is not necessary to detail all her testimony. In view of the circumstances, as she gave them, it was especially important that the jury should have laid before them whatever she could state having a legitimate bearing on the question whether the act imputed to defendant was against her will, and to this end it was incumbent on the court to be very tolerant to cross-examination of her. Whether the defendant should be convicted or not, depended upon her evidence, and the nature of the offense suggests the necessity for great caution where the proof is not very decided upon the fact of assent, however full upon the other points.

Now on her direct examination she swore that she related part of the transaction to Mrs. Welch, and also to her mother, and that she afterwards stated the whole of it to Mr. Welch, and went before Mr. Westbrook, a justice, and told it. She was then asked on cross-examination if she told the whole voluntarily, or whether others came and asked her about it, and also whether she wanted to prosecute defendant for what he did, or if she was told by some one else she must prosecute him. This was excluded on objection by the prosecuting attorney.

These inquiries would seem not to have been very important in themselves, but we think they bore somewhat upon the point whether or no the defendant's act, supposing it to have been committed, was against her will, and should have been admitted. If an account of the fact was drawn from her by persuasion or the influence of authority or fear, and if she was only brought to prosecute because she was told she must, then her attitude in regard to the affair was more open to a construction against the claim that she was forced, than if she had revealed the facts voluntarily and had of her own accord proceeded to prosecute. At the same time it should be borne in mind that such reluctance on her part would not necessarily be inconsistent with her having refused to yield. The matter would have to be considered by the jury with the other facts, and would be sub-

ROGERS v. PEOPLE.

ject to their interpretation in the light of all the circumstances.

Some other objections are stated, but there are none of any force which will be likely to arise on another trial.

The judgment must be reversed; and a new trial ordered, and the defendant must be surrendered to the sheriff of St. Clair county to be dealt with according to law.

The other Justices concurred.

Hiram D. Wilmarth v. Ervin Palmer.

Tenants in common: Use and occupation: Co-tenants. A tenant in common of lands is not liable to his co-tenants for use and occupation by him of their common estate, in the absence of any agreement or understanding that he was to pay for the same.

Adverse holding: Landlord and tenant: Rent. And the suggestion that his holding was adverse would not better the matter, since that would destroy the relation of landlord and tenant entirely, and would be equally fatal as an objection to recovering rent.

Submitted on briefs June 8. Decided June 21.

Error to Wayne Circuit.

This was an appeal by Ervin Palmer from the decision of the commissioners on claims in the matter of the estate of James Lee, deceased, disallowing his claim. The cause was tried by jury and judgment rendered in Palmer's favor, and Wilmarth, the administrator, brought error.

W. A. Green and F. A. Baker, for plaintiff in error, relied upon *Everts v. Beach*, 31 Mich., 136, and *Hogsett v. Ellis*, 17 Mich., 351.

Ward & Palmer, for defendant in error, conceding that one tenant in common cannot recover rent of his co-tenant when each is left to his own choice to occupy or not,

WILMARTH v. PALMER.

argued that where one joint owner is in exclusive possession of the whole premises, and claiming title to the whole, the general rule of joint tenancy does not obtain, and cited: *Bray v. Bray*, 30 Mich., 479; *Fiquet v. Allison*, 12 Mich., 328; *Hone v. Howell*, 46 Ga., 9; *Israel v. Israel*, 30 Md., 120; *Noble v. McFarland*, 51 Ill., 226; *Seers v. Sellers*, 28 Ia., 501; *Freeman v. Cheny*, 46 Ga., 14; *Graham v. Pierce*, 19 Grat., 28; *Early v. Friend*, 16 Grat., 21.

CAMPBELL, J:

Ervin Palmer undertook to prove a claim against Lee's estate, consisting of demands purchased from co-tenants of Lee for use and occupation by him of their common estate.

There was no proof of any agreement or understanding that Lee was to pay his co-tenants for the use of the land. This being so, the case comes directly within the ruling in *Everts v. Beach*, 31 Mich., 136, and the court erred in holding that there was such a liability.

The suggestion that the tenant held adversely would destroy the relation of landlord and tenant entirely, and would be equally fatal as an objection to recovering rent.—*Hogsett v. Ellis*, 17 Mich., 351.

The judgment must be reversed, with costs.

The other Justices concurred.

James J. Boyce and another v. Solomon S. Stambaugh.

Evidence: U. S. land patent: Transcript of record: Certificate. A transcript of the record of a United States patent of lands, certified by the commissioner of the general land office to be "a true and literal exemplification from the record in this office," is held to be sufficiently certified under the United States statute (*Rev. Stat.*, p. 168, § 891, p. 454, §§ 3469-70) to be admitted in evidence.

BOYCE v. STAMBAUGH.

Evidence: Deeds: Ejectment. It is no valid objection to the admission in evidence of a deed to the plaintiff from one who is shown to have been sole heir of the grantor in a previous deed, in plaintiff's chain of title, which was defective, that such later deed recited that it was given to supply the defect in the prior deed, and that such prior deed had not been produced and proved; the recital did not detract from the force of the later deed, and if the prior deed was valid, plaintiff had the title through it, and if not, then the later deed transferred it.

Submitted on briefs June 9. Decided June 21.

Error to St. Clair Circuit.

Frank Whipple and A. E. Chadwick, for plaintiffs in error.

C. W. Everett and Mitchell & Avery, for defendant in error.

MARSTON, J:

This was an action of ejectment. Plaintiff below, defendant in error, upon the trial offered in evidence an exemplified transcript of the record of a patent of the lands in question, from the United States to Francis G. Macy, certified to by the commissioner of the general land office, to which defendants' counsel objected, because the same was not properly certified to. We think the objection was not well taken. The certificate was in the usual form, and such as was authorized by the laws of the United States.—*Rev. Stat.*, p. 168, § 891, p. 454, §§ 2469, 2470.

Plaintiff's counsel also offered in evidence the record of a deed purporting to be executed by Francis G. Macy and wife, of Erie county, New York, to George Hussey *et al.* This deed was dated September 10, 1836, and purported to have been acknowledged in the state of New York, October 1, 1836. The record disclosed but one subscribing witness. Defendants' counsel objected to the reading of the record of this deed in evidence. Plaintiff further introduced deeds from Hussey *et al.*, the grantees in the Macy deed, to Frances Crawford, and from the latter to himself. He also introduced the deposition of Charlotte P. Beardsley, who testified that Francis G. Macy resided at Buffalo, New York,

BOYCE v. STAMBAUGH.

during the years 1835 and 1837; that he died in May, 1858, and that she was the sole surviving heir of said Francis G. Macy. Counsel then introduced a deed dated October 15, 1874, from said Charlotte P. Beardsley to plaintiff, of the premises in question. This deed contained a recital that the object in making it was to supply a defect in a deed for the same land from Francis G. Macy and wife to George Hussey, dated September 10, 1836, and recorded in Liber E, page 224, of deeds for St. Clair county, Michigan.

Defendants' counsel objected to the reading of this deed, because the deed referred to therein had not been produced and proven; that there was no evidence of title in the grantor, and because it did not purport to convey the fee of the land in question, although describing it.

These objections were not well taken. It was of no sort of consequence whether the deed referred to therein had been produced and proven or not. The reference was not necessary to supply any defect in this last deed. It was complete without it. The land was properly described therein, and the grantor, in consideration of one hundred dollars, bargained, sold and quit-claimed the same to the plaintiff. This conveyance, therefore, without any reference to the deed referred to therein, properly passed any title remaining in Mrs. Beardsley, as heir of Macy, to the lands therein described. This deed and the evidence of Mrs. Beardsley having been introduced, it became of no importance whether the deed from Francis G. Macy, of September 10, 1836, was valid or not. If it was, the plaintiff traced title therefrom to himself. If not, the title remained in Macy, and after his death the conveyance from Mrs. Beardsley, as sole heir, passed the title to plaintiff. In either case plaintiff had traced title to the premises in dispute from the United States to himself.

There being no error, the judgment must be affirmed, with costs, and the record remanded for further proceedings.

The other Justices concurred.

CAMPBELL v. PEOPLE.

William Campbell v. The People.

Criminal law: Rape: Assault with intent to ravish. It is competent, under an information charging rape, for the jury to find the respondent guilty of assault with intent to ravish.

Evidence: Objections: Reasons. It is too late on review to assign reasons for an objection to the admission of evidence, for which none were assigned on the trial.

Charge to the jury: Good reputation. An exception to the refusal to give a request to charge on the weight to be given to evidence of good character on a trial for crime, which was not improper in itself, is not sustained where the charge as given on the subject was not essentially different in substance, and was calculated to ensure to the respondent the full benefit of his good reputation.

Submitted on briefs June 14. Decided June 21.

Error to St. Clair Circuit.

Atkinson & Stevenson, for plaintiff in error.

Andrew J. Smith, Attorney General, for the People.

COOLEY, CH. J:

The plaintiff in error was convicted of an assault with intent to ravish, upon an information which charged only the commission of the principal offense. One of the errors assigned is, that the information does not support the conviction.

The previous rulings of this court in *People v. McDonald*, 9 Mich., 150, and *Hanna v. People*, 19 Mich., 316, are decisive of the point made. In each of those cases it was decided that under an indictment charging a specific offense it was competent for the jury to find the respondent guilty of a lesser offense included in it. The lesser offense of felonious assault is necessarily included in the offense of rape; the completed offense being the aggravation of the criminal assault.

Exception was also taken to the reception in evidence of the return of the justice before whom the prisoner had his

CAMPBELL v. PEOPLE.

preliminary examination. This was objected to on the trial, but no reason was assigned for the objection. We think it too late to assign any now.

The defendant gave evidence of good character and reputation, and requested the court to instruct the jury as follows: "Good character is an important fact with any man, and never more so than when upon trial for a crime such as is charged in this case, and may not only raise a doubt of guilt which would not otherwise exist, but may bring a conviction of innocence; and if you find that the defendant was a man of good character and reputation, you will consider this in relation to the other circumstances in the case, and give it such weight as it is entitled to in the light of the law as here given you." The court, instead of giving this instruction, substituted the following: "The defendant has offered evidence tending to show his good character. It is not usual, perhaps, for good men to commit crime, but it is possible, and men who stood high have been convicted. You will consider the evidence with the rest, and give the prisoner all the benefit of it that you believe him to be entitled to."

This substitution is excepted to; the respondent insisting upon his right to the instruction requested. But while we think the court might properly have acceded to the request, we do not think it was a matter of right. The instruction as given was not essentially different in substance, and was calculated to ensure to the defendant the full benefit of his good reputation.

The judgment must be affirmed.

The other Justices concurred.

CURLEY v. WYMAN.

Charles Curley v. Hiram Wyman.

Practice: Requests to charge: Want of evidence: Record: Presumptions.

The refusal to grant a request to charge, that there was no evidence to establish a specified fact, cannot be held error where the bill of exceptions does not affirmatively show that no such evidence was given. Error will not be presumed.

Evidence: Intoxicating liquors: Construction. In an action to recover for goods furnished by plaintiff to defendant's father and mother at his request, the plaintiff's statement as a witness, that a part of the goods furnished were intoxicating liquors, and he "couldn't tell the amount," is construed, in connection with his other testimony, as to the bill of particulars of his demand, *i. e.*, that it was a copy of his books, not to mean that the items for liquors were incapable of being separated and distinguished from the others, so as thereby to render his whole claim void.

Heard June 14. Decided June 21.

Error to St. Clair Circuit.

Atkinson & Stevenson, for plaintiff in error.

Mitchell & Avery, for defendant in error.

MARSTON, J:

Defendant in error brought an action of assumpsit to recover a balance which he claimed plaintiff in error owed him for goods furnished his father and mother at his request.

Counsel for plaintiff in error insist that the court erred in refusing to charge the jury as requested by plaintiff in error in his second* request to charge.

It is sufficient to say that the bill of exceptions does not purport to contain or set forth all the evidence given on the trial. The court having refused to charge the jury that there

*2. That if you find that there was no settlement between plaintiff and defendant, on June 25, 1875, there is no evidence before you that defendant was indebted to plaintiff at that time, and, in any case, plaintiff could only recover the value of goods furnished since that time, after deducting the payments, and unless from the evidence before you you can determine that amount, the defendant is entitled to a verdict.

CURLEY v. WYMAN.

was no evidence to sustain or establish a part or the whole of plaintiff's case, we must presume that the refusal to so charge was correct, and that such evidence had been introduced, else the request to charge would have been given. The bill of exceptions, however, does show that there was evidence given upon this point; true, it is not very clear just what the evidence was, yet we cannot say that there was a total want of evidence; besides the presumption under the refusal to charge is that there was.

Plaintiff in error next complains that the court erred in refusing to give his third* request, and in charging the jury that if they should find a fair preponderance of proof in support of plaintiff's claim, that the credit was given to defendant with his knowledge and consent and by his direction, that there was a balance of account due in June, and that other articles were furnished after that date upon the same promise and agreement, they would find for the plaintiff for such balance, deducting the amount paid for liquors.

There was no error in refusing to give defendant's third request. And the only reason presented, to show that the court erred in charging the jury as above stated, was, that plaintiff had sold to defendant's father and mother intoxicating liquors prior to May 3, 1875, and that the consideration therefor entered into and became a part of the account which plaintiff sought to recover. And it was also claimed that it was impossible for the jury to determine what portion of the claim was for such liquors, and that the whole claim was therefore rendered void.

The difficulty with this argument is, that the facts do not warrant any such conclusion. Repeated decisions in this state declare that error cannot be presumed, but must be made to affirmatively appear by the party complaining; that all presumptions are in favor of the validity of the verdict and judgment, and that the necessary and proper

* 3. That under the pleadings and proofs in this case the defendant is entitled to a verdict, and for the amount of money paid by him, if any, during the months of January and February, 1875, to plaintiff.

CURLEY v. WYMAN.

evidence was laid before the jury to justify them in coming to the conclusion which they did. The only portion of the bill of exceptions which it is claimed shows such an inseparable admixture of the whisky and grocery account is where the plaintiff upon cross-examination testified "that a part of the account before and after June 25th was for intoxicating liquors; commenced getting liquors at beginning of account in January and kept on getting until October, and couldn't tell the amount." This must be taken in connection with his direct examination, where, in speaking of the goods furnished, he was shown a "paper, the bill of particulars of plaintiff's demand in said cause, and was asked, * * * state, if you know, whether that bill of particulars is a statement of the items furnished defendant. Witness answered that it was a copy of his books." It would appear from this, even could we presume there was no other testimony, that an account showing the items furnished was in court and used by the witness while upon the stand; and it is but fair to assume that an itemized account would show whether any part, and if so, how much was for liquors. His cross-examination, where he said he "couldn't tell the amount of liquors sold and entering into the account," is not inconsistent. The items may have shown the amount, but the witness may not have separated them, and yet, from all the evidence in the case, the jury would have had no difficulty in making such separation. We cannot assume that they could not.

The court instructed the jury to deduct from any balance they might find due plaintiff all moneys paid by defendant for intoxicating liquors, and a large deduction seems to have been made by the jury from the amount of the plaintiff's claim.

We find no error in the record. The judgment must be affirmed, with costs.

The other Justices concurred.

FOSTER v. GAFFIELD.

Frances J. Foster v. James W. Gaffield.

Special findings: General verdict: Inconsistency: Statute construed. It is only competent, under the statute (Comp. L. § 6036), to render judgment upon special findings of fact, and against the general verdict, upon the ground that they are inconsistent, where it is impossible, though all presumptions be made in favor of harmony, to reconcile the special findings with the general one.

Special questions to jury: Construction: Controlling general verdict. Special questions to the jury and their answers thereto are to be applied by the record only, and not by explanations outside the record; and such a question and finding, which regarded in the light of the record is meaningless or irrelevant, ought not to control a general verdict.

Special findings: Inconsistency: General verdict. Where two special findings are inconsistent with each other, and only one of them is inconsistent with the general verdict, they neutralize each other and leave the general verdict to stand.

Replevin: Special findings: Possession: Detention: General verdict. Where in an action of replevin the jury in response to one special question have answered that the property was not detained or held by defendant when the suit was brought, and to another that he was connected with the detention or possession thereof, it is to be presumed their meaning was, that though defendant did not personally hold or detain the property, he was a party in some way to the detention; and so construed, these special findings are not inconsistent with a general verdict for plaintiff.

Heard June 14. Decided June 21.

Error to St. Clair Circuit.

Atkinson & Stevenson, for plaintiff in error.

Mitchell & Avery, for defendant in error.

CAMPBELL, J:

Plaintiff brought replevin for a sewing machine, which was not taken on the writ, and the case proceeded under the statute applicable in such circumstances, whereby provision is made for the recovery of the property or the value thereof against the defendant who is shown to be liable.— 2 C. L., § 6738.

The jury rendered a general verdict for the plaintiff. They also answered certain specific questions, and the circuit.

FOSTER V. GAFFIELD.

court, regarding those answers as inconsistent with the general finding, entered a judgment for the defendant. This action is assigned as error.

The statute which is supposed to justify this judgment declares that "when a special finding of fact shall be inconsistent with a general verdict, the former shall control the latter, and the court shall give judgment accordingly." 2 C. L., § 6026.

As this provision is one which very seriously affects the principle of trial by jury, in which a general verdict has always been regarded as within the right of the jurors, and not to be inquired into in its elements if the panel is unanimous in the result, the change, which determines in favor of the special as against the general finding, can only be made operative where the two cannot be reconciled. All presumptions must be made in favor of harmony, where harmony is possible, because both findings are under the same oath.

In the case before us the jury were desired among other things to answer three specific questions, which were as follows:

1. "Had defendant entirely parted with possession to Corbishley before the affidavit was made?" Answer—"Yes."
2. "Was the property then detained or hold by defendant?" Answer—"No."
3. "If he had sold it before, was he then in any way connected with the detention, or possession; if so, how?" Answer—"Yes."

It may be remarked that the first of these questions, which must be applied by the record, and not by parol evidence which does not appear on the record, is by itself meaningless. There is nothing on the record to show what Corbishley had to do with the case, and the question can only be made intelligible by explanations which are entirely beyond the record. To control a general verdict by such a finding would be a dangerous practice. In an appellate court, where the record may be brought up without exceptions, the relevancy of the finding would not be obvious.

FOSTER V. GAFFIELD.

Assuming it to refer, as it no doubt does, to the property in litigation, it is very questionable whether this assumption would justify interference.

But the second question and its answer are supposed to show conclusively the incorrectness of the general verdict. This answer finds that the defendant did not hold or detain the property when the suit was commenced, but the third answer finds that he was in some way connected with the detention or possession.

It must be presumed that the jury in their answer to the second question understood it to refer to personal and immediate detention or holding, while they were satisfied that, although not holding it personally, the defendant was a party in some way to the detention. This was certainly consistent with the general verdict. If the second and third answers are claimed to be inconsistent with each other, then one would neutralize the other, and so leave the general finding to stand. In either view the verdict could not be disturbed. But we do not think there is any difficulty in reconciling them all.

We do not think the case calls for any discussion of the question, whether under our statutes an action of replevin will lie against a party who does not detain the property at the time of suing out the writ and making the affidavit, where he has wrongfully taken or detained it before. That difficulty is not presented by the record before us, and can be more safely disposed of when the facts are such as to require its decision.

The judgment below must be reversed, and a judgment entered for the plaintiff on the general verdict, with costs of both courts.

The other Justices concurred.

PEGLER v. HIGHWAY COMMISSIONERS.

Charlotte C. Pegler v. The Highway Commissioners
of Grand Rapids.

Eminent domain: Highways: Notice: Meetings. Proceedings to establish a public highway through private lands cannot be sustained where the record fails to show service of the statutory notice of the meeting; and a showing of notice of a meeting to be held April 25th will not uphold a meeting held May 11th, in the absence of any showing of notice of such latter meeting, or that it was held as an adjourned meeting.

Submitted on briefs June 16. Decided June 21.

Certiorari to the Commissioners of Highways of Grand Rapids.

The proceedings in question were taken to establish a public highway through lands belonging to the plaintiff in this writ.

Champlin & Fitzgerald, for plaintiff in *certiorari*.

No counsel appeared for defendant in *certiorari*.

MARSTON, J:

The return to the *certiorari* issued in this case shows a notice was given that the commissioners would meet at a certain place on the 25th day of April, 1874, to view the premises, etc. The record or return does not show that they met upon that day, but that they did meet upon the 11th day of May, 1874. It does not appear that any notice whatever was given of this meeting, or that it was an adjourned meeting. There are other errors apparent, but the above is sufficient.

The proceedings must be quashed, with costs.

The other Justices concurred.

KOHLE V. LYNN.

Hermann Kohl v. James S. Lynn.

Chattel mortgages: Registry: Subsequent purchasers or mortgagees in good faith. The statute (Comp. L., § 4706), which makes an unrecorded chattel mortgage void against "subsequent purchasers or mortgagees in good faith," is intended to protect those only who have acquired rights such as would render them liable to be defrauded but for this protection against instruments of which they had no notice when they obtained their rights.

Bona fide purchaser. A purchaser who has paid nothing does not come within this protection, and no one can be protected as a *bona fide* purchaser except to the extent of his payments made before notice.

Chattel mortgages: Legal title: Sales by mortgagees: Accounting for proceeds. A chattel mortgage does not transfer the legal title until after foreclosure or something equivalent thereto, which must usually be by a sale; and the proceeds of sales by the mortgagee are to be treated as moneys collected to apply on the security, and do not belong to the mortgagee beyond the extent of his lawful claim as a creditor.

Replevin: Special property: Chattel mortgages: Mortgagee's interest. Under the statute (Comp. L., § 6764) requiring judgment in replevin to be according to the respective rights and interests of the parties in the property, the exact extent of the subsisting claim of a mortgagee who brings replevin is a legitimate subject of inquiry.

Heard June 16. Decided June 21.

Error to Kalamazoo Circuit.

O. T. Tutthill, for plaintiff in error.

May, Powers & Gates, for defendant in error.

CAMPBELL, J:

Lynn, who had a chattel mortgage against certain horses and a wagon (with other property), executed to him by one Brown, replevied them from Kohl, who had bought them on credit from Brown, without notice of Lynn's mortgage, which was not properly recorded.

Upon the trial in the court below, the parties both took somewhat extreme grounds, Kohl insisting as a purchaser in good faith that Lynn's mortgage was void for want of record, and Lynn claiming that his title had become absolute and beyond redemption.

KOHLE V. LYNN.

The statute which makes a mortgage of chattels, which has not been recorded, void against "subsequent purchasers or mortgagees in good faith" (2 C. L., § 4706), uses those terms in the sense which has always been attached to them by judicial decisions. The only object of the law is to protect those who have acquired rights under circumstances which would render them liable to be defrauded unless protected against instruments of which they knew nothing when they obtained their rights. It has always been held that a purchaser who had paid nothing could not be thus defrauded, and that no one could be protected as a *bona fide* purchaser except to the extent of his payments made before he received such notice as should have prevented him from making further payments. This doctrine has been too uniformly recognized to require discussion or citation of authorities.

As Kohl had made no payments at all before the property was replevied from him, he was not a *bona fide* purchaser, and his rights are subject to the mortgage.

But, on the other hand, it is also well settled in this state that the title of a mortgagee of chattels does not become absolute until the mortgagee has done some act equivalent to a foreclosure, which must usually at any rate be by a sale; and any moneys realized from such a sale must be treated as moneys collected to apply on the security, and not as the absolute property of the mortgagee, beyond the extent of his lawful claim as a creditor.—See *Lucking v. Wesson*, 25 Mich. R., 443; *Baxter v. Spencer*, 33 Mich. R., 325; *Cary v. Hewitt*, 26 Mich. R., 228; *Flanders v. Chamberlain*, 24 Mich. R., 305; and many other cases.

The property replevied from Kohl was only a part of that mortgaged to Lynn. His chattel mortgage covered also a quantity of growing wheat, which was threshed and sold by Lynn some time after this suit was commenced. Kohl sought to ascertain what amount was obtained for this wheat, but the court below excluded the evidence. In this there was error.

If the wheat was sold for enough to pay the mortgage

 KOHL v. LYNN.

debt, then the mortgage was discharged, and Kohl would be entitled to a return of the property, or such other judgment as would be equitable. And if the debt was not entirely discharged, he was still entitled to show the extent to which Lynn's claim had been reduced, and to pay it and redeem the property. The statute contemplates that in an action of replevin the exact extent of the special property of either party may be shown, so that any judgment which is rendered may correspond to the justice of the case.—2 C. L., § 6754.

We find no other errors which would affect the result, although some of the rulings conflict more or less with the principles which we have laid down.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

Noyes L. Avery, Assignee in Bankruptcy of Alexander Blake v. Martin Eyerson and others.

Bill to redeem: Assignee in bankruptcy: Permission of bankruptcy court. An objection to a bill to redeem by an assignee in bankruptcy, that it is not shown that the assignee obtained permission to bring the suit from the court of bankruptcy, if of any force in any event, will not be considered unless it is pleaded.

Foreclosure: Assignee in bankruptcy of subsequent mortgages: Estoppel. An assignee in bankruptcy holding a subsequent mortgage, having filed a bill to redeem from a prior mortgage which had been foreclosed in chancery by proceedings to which he was not made a party, the fact that in the course of negotiations for an amicable redemption, before filing his bill, he had received from the mortgagor an order for the surplus moneys on the foreclosure sale, which had been paid into court, and had passed it to the solicitor of the purchaser at such sale, to enable him to get back the money, cannot be urged against him as evidence of his acquiescence in the sale as having cut off his subsequent mortgage; at least not where no such ground of defense is set up in the answer.

AVERY v. RYERSON.

Subsequent mortgage: Right of redemption: Foreclosure: Parties. The right of the holder of a subsequent mortgage to redeem from a prior mortgage is not cut off or affected by a foreclosure decree and sale under the prior mortgage, where at the time of such decree and sale no party to the foreclosure suit in any way represented or had any right or interest in such subsequent mortgage.

Foreclosure: Assignee in bankruptcy of subsequent mortgages: Death: Abatement. Where an assignee in bankruptcy of a subsequent mortgagee, who has been made a party defendant to a foreclosure bill, dies before decree, the right to bind such subsequent mortgage by the decree and sale, thereby terminates as completely as if a sole administrator of the subsequent mortgagee had in like manner been made such party and afterwards died.

Foreclosures: Subsequent mortgage: Decree: Sale: Purchaser: Redemption. Where a chancery foreclosure to which an assignee in bankruptcy of a subsequent mortgagee has been made a party, had proceeded to decree and sale after the death of such assignee, without bringing in his successor, or any one else who represented such subsequent mortgage, it was held, in a suit brought by the successor of such assignee to redeem, that his equities were superior to those of the purchaser at the foreclosure sale, and a decree for redemption was granted.

Foreclosure: Subsequent mortgages: Assignee in bankruptcy: Parties: Permission of bankruptcy court. Whether where an assignee in bankruptcy has proceeded to decree in the federal court on a bill to foreclose a subsequent mortgage, it is competent, without permission of the bankruptcy court, to make him a defendant to a bill to foreclose a prior mortgage, so as thereby to affect his rights under the subsequent mortgage:—*Quære?*

Foreclosure: Subsequent mortgage: Assignee in bankruptcy: Averment. Whether if it be competent under such circumstances thus without such permission to make the assignee in bankruptcy a party defendant and thereby conclude his rights under the subsequent mortgage, an averment simply that as assignee of A B (the subsequent mortgagee) he had or claimed to have rights and interests in the premises, or some part thereof, as subsequent incumbrancer or otherwise, is sufficient:—*Quære?*

Heard June 16. Decided June 21.

Appeal in Chancery from Newaygo Circuit.

Standish, Fuller & Standish, for complainant.

Albert G. Day and Gray & Luton, for defendant Courtwright.

GRAVES, J:

On October 13, 1866, Elihu Cooper mortgaged the south-east quarter of section two, town eleven north, range thirteen west, to the defendants, Martin Ryerson, Charles T. Hills, Henry H. Getty, and one Ezra Stevens, for four hun-

AVERY v. RYERSON.

dred dollars of purchase money, payable in two equal annual payments. The mortgagees composed the firm of Ryerson, Hills & Co., and Stevens afterwards died.

About a year and a half later, and on the 28th of May, 1868, Cooper made a second mortgage to Alexander Blake for thirteen hundred and ninety-nine dollars, payable one-half in two, and one-half in three years. Both mortgages were accompanied by Cooper's notes, and both were duly recorded. Shortly after this last mortgage was given, and on the 10th of June, 1868, Blake was adjudged a bankrupt in the district court at Grand Rapids, on the petition of his creditors, and Wilder D. Foster was made official assignee, and Blake's estate, including this last mortgage, was duly assigned.

In January, 1871, Mr. Foster, as official assignee, took steps in the circuit court of the United States to foreclose this mortgage. He filed a bill therefor against Cooper and wife, and finally, and on the 15th of June, 1871, a decree and order of sale were passed. In this proceeding there was found due on the mortgage and notes the sum of sixteen hundred ninety-three dollars and forty cents, and sale was ordered to be made at any time after July 24th, 1871.

No further steps have been taken in the case.

In this state of things Ryerson, Hills & Getty, as surviving members of the firm of Ryerson, Hills & Co., afterwards, and on April 16, 1873, filed their bill in the circuit court for the county of Newaygo in chancery to foreclose the first mortgage, and Wilder D. Foster was made a defendant under an allegation that "as assignee of Alexander Blake he had, or claimed to have, rights and interests in the premises," "or in some part or parts thereof, as subsequent purchaser, incumbrancer, or otherwise."

The bill showed nothing further respecting Foster's relation to the subject matter of the suit. The subpoena was personally served upon him, and on the 15th of September, 1873, the bill was taken as confessed for want of appearance and an order of reference was entered.

AVERY v. RYERSON.

Five days thereafter, that is, on the 20th of September, 1873, Mr. Foster died, and on the 15th of October following, a final decree was made for a sale of the land at any time after April 17, 1874.

The amount reported due by the commissioner was two hundred and ninety-eight dollars and eight cents, being thirty-five dollars too much. On the 20th of April, 1874, the premises were sold under the decree to the defendant Courtright for eight hundred and five dollars, and the commissioner gave his deed on the same day. The surplus money was paid into court. The decree was not enrolled, or the sale confirmed, until nine days later.

In less than two months after Mr. Foster's death, and less than one after final decree, and less than seven after the bill was filed, and when it was necessary to wait more than five months before a sale could lawfully occur, the complainant in this cause was appointed assignee in the place of Mr. Foster, and he has remained such assignee since that time.

Notwithstanding the amplitude of the time, Ryerson & Co. made no pause in the prosecution of their foreclosure on account of the death of Mr. Foster and the temporary vacancy in the assigneeship, and took no notice whatever of these occurrences and the consequent want of a defendant to represent the Blake mortgage. On the contrary, they pressed the case and conducted it, as though nothing had happened, to computation, decree and sale.

Complainant Avery was ignorant of the foreclosure proceedings until the day succeeding the sale to Courtright, and having then learned about it, he went at once, in company with Cooper, the mortgagor, to Courtright, and proposed to redeem and offered to repay him, but the offer was refused. Cooper offered in addition a quantity of wood, and still Courtright persisted in his refusal. Under these circumstances, in less than three weeks after the sale, namely, May 8, 1874, Avery filed this bill in the court below to redeem.

AVERY v. RYERSON.

The defendant Courtright answered, and the other defendants allowed the bill to be taken as confessed.

Proofs having been taken, the court below dismissed the bill on final hearing.

Whether in view of Foster's situation as official assignee in bankruptcy, and of the proceedings had in the federal court to foreclose the Blake mortgage, it was competent without permission of the bankruptcy court to make him a defendant in the suit brought by Ryerson and others in the court below, so as to affect the right under the Blake mortgage, we shall not inquire, because we do not think the question is of any practical importance in this controversy. And for the same reason we shall not pause to ascertain whether the bill of Ryerson and others was aptly framed in any event to bind through Foster the right based on the Blake mortgage.

The objection now made, that Avery is not shown to have obtained permission to bring this suit from the court of bankruptcy, if of any force in theory (*1 Dan. Ch. P., 311, 4 Am. ed.*), is sufficiently answered by the circumstance that it has not been pleaded in any way.

By the sale to Courtright a sum was obtained much larger than was necessary to satisfy the debts and costs, as determined in that case, and as before stated, the balance was paid into court. And it appears that Cooper, the mortgagor, gave his order on the register, for this surplus, to Avery, but that Avery did not use it. On the contrary, he passed it to Courtright's solicitor, and the evidence is pretty plain that this occurred in an attempt to bring about a redemption by negotiation, which failed. There is not the least reason for saying that Avery received this order with any idea of taking the surplus money as an act of acquiescence in Courtright's claim that his purchase had cut off the Blake mortgage. The fact has no such meaning. Avery does not appear to have yielded at any time to Courtright's position. He was insisting upon the right to redeem, and he was trying to bring it about without litigation, and he

AVERY v. RYERSON.

manifestly got the order to enable him to get the money back to Courtright in case of amicable redemption.

Moreover, it is to be noticed that the answer asserted no such ground of defense.

It follows that the point urged by counsel, that Avery's acceptance of this order concluded him, is quite untenable.

It seems to the court that on the case exhibited the complainant's equity is clear. The value of the land was and is much greater than the price Courtright paid, and he is seeking to make a profit, and complainant to avert a loss on the part of Blake's estate. The Blake mortgage, as before mentioned, was recorded, and it remains an incumbrance and foundation for redemption unless cut off by the decree and sale in the case of Ryerson and others. It was not cut off thereby, because when the decree and sale were made respectively, no party to the suit had, or appeared, or was supposed to have, any right or interest in it or power or control over it.—*Brown v. Thompson*, 29 Mich., 72; *Cooper v. Martin*, 1 Dana, 25; *Haines v. Beach*, 3 J. C., 459; *Bell v. The Mayor*, 10 Paige, 49; *Watson v. Spence*, 20 Wend., 260; *Fuller v. Van Geesen*, 4 Hill, 171; *Brainard v. Cooper*, 6 Seld., 356; *Requa v. Holmes*, 16 N. Y., 193; S. C., 26 N. Y., 338.

Mr. Foster having died before decree, the right to bind the Blake mortgage by the action dropped, and the after proceedings were of no force against it.

If Foster had been sole administrator of Blake's estate, and in that character had been joined as defendant, no one would have questioned the effect of his death.

Every one would concede that the decree made after his death could not operate against the mortgage belonging to the estate he represented. The principle is the same here. Ryerson and others were not compelled to join him as defendant at all. It is not a question of jurisdiction as against the mortgagor or owner of the equity of redemption, or a question whether the decree can be impeached. But the point is, whether the decree can bind unrepresented in-

AVERY v. RYERSON.

terests. Ryerson and others could foreclose Cooper without being bound to include subsequent incumbrancers. They might have left out the representative of the Blake mortgage in the first place, or they might have done so afterwards, by amendment of the bill, or by voluntary dismissal as to him, and there was no inherent and vital objection to their proceeding after his death without a defendant in his place, if satisfied to leave the case so shaped that it could only reach Cooper's equity of redemption and could not affect the Blake mortgage. But the suit could not be made equally to affect that mortgage whether there was or was not a party representing it. A decree given when there was no one in the cause in any way representing the Blake mortgage, could not affect that mortgage. If Ryerson and his co-complainants had purchased at the foreclosure sale it would hardly be thought admissible to argue that they had acquired a title which cut off this second incumbrance. And yet, in view of the principle which really governs the question, Courtright's position gives him no higher right to make such a claim than they would have had. When Mr. Foster died, the representation of the Blake mortgage fell into abeyance and remained so until Avery's appointment. The suit became defective in respect to that incumbrance, and this defect, under the actual circumstances, was not susceptible of cure prior to that appointment. But beyond this interest there was no abatement.

It is not unworthy of notice that Ryerson & Co. were not caused to encounter any special difficulties in the prosecution of their foreclosure for the want of some one to represent the Blake mortgage. They were not placed in a situation where they must either proceed without a representative of that interest as a party or unduly delay obtaining of the fruits of their action. The interval between Mr. Foster's death and Avery's appointment was short, and not long enough to hinder a sale at the earliest moment permitted by law.

Had it been otherwise, however, we cannot doubt but

AVERY v. RYERSON.

that an application to the bankruptcy court for an appointment would have been successful. In conclusion, we find that the Blake mortgage has not been cut off, and it appears to the court that complainant, as the representative of the right resting upon it, has, in coming forward to redeem, an equity paramount and superior to that of Mr. Courtright.

Several topics alluded to and authorities cited in the elaborate brief of Mr. Courtright's counsel are not specially noticed. They do not appear to be strictly pertinent to the essential ground of the controversy.

The decree below will be reversed, with the costs of both courts, and a decree for redemption will be entered in proper form hereafter in accordance with the principles of this opinion.

The other Justices concurred.

William S. Duncan v. Harvey Seeley.

Evidence: Recollection refreshed by memorandum: Production of the writing.

Plaintiff, while on the stand as a witness, was questioned as to a date, and replied he could not state it positively without refreshing his memory by a memorandum he had; after professing to look, he stated that what he had looked at did refresh his memory; being called upon by defendant's counsel to produce the memorandum, plaintiff's counsel objected and the objection was sustained:—

Held, That this was error; that the witness was in effect testifying not from recollection, but from something he professed to have in writing; and that defendant had a right to know what the memorandum was on which witness relied, and whether it had any legitimate tendency to bring to mind the fact in controversy.

Testifying from memorandum: Refusal to produce the writing: Subsequent offer to produce: Error not cured. The error committed in declining to require the production of the memorandum thus referred to is held not to have been cured by an offer the next day to produce the memorandum; the party was entitled to see it at the time, in order to test the candor and integrity of the witness.

31 MICH.—47.

DUNCAN v. SEELEY.

Evidence: Cross-examination. In an action to recover the price of barley claimed to have been sold and delivered by plaintiff to defendant, the question put to plaintiff on cross-examination, as to how long he had speculated in barley, is held to have been improperly overruled, there being nothing to indicate that it was put in an offensive sense, and it being a proper question to test his skill in judging of qualities.

Heard June 18. Decided June 21.

Error to Superior Court of Detroit.

Jared Patchin, for plaintiff in error.

Jackson & Wisner, for defendant in error.

COOLEY, CH. J.:

Seeley brought suit against Duncan to recover the price of certain barley, which he claimed to have sold to Duncan at Pontiac, and forwarded to him at Detroit according to agreement. The dispute between the parties related to the quantity bought, and whether all of that which was forwarded was included in the purchase.

On the trial, the plaintiff, being on the stand, was questioned by his counsel as to the time when he was at the place of the alleged sale after the sale was made; it being deemed important to show that he was there on a certain day. Plaintiff in reply stated that he could not state positively without looking at something to refresh his memory. And after professing to look, he stated further that what he had looked at did refresh his memory. He was then called upon by defendant's counsel to produce the memorandum at which he had looked, but the counsel for plaintiff objected, and the court sustained the objection. We think this was erroneous. The witness was in effect testifying not from recollection, but from something which he professed to have in writing; and the other party had a right to know what the memorandum was on which he relied, and whether it had any legitimate tendency to bring the fact in controversy to mind. It would be a dangerous doctrine which would permit a witness to testify from secret memoranda in

DUNCAN v. SEELEY.

the way which was permitted here. The error was not cured in this case by the plaintiff offering on the next day, on the conclusion of his testimony, to produce the memorandum. The defendant was entitled to see it at the time in order to test the candor and integrity of the witness; and the opportunity for such a test might be lost by a delay which an unscrupulous witness might improve by preparing or procuring something to exhibit.

We also think the court erred in overruling a question put to the plaintiff on cross-examination, as to how long he had speculated in barley. The objection made to it was, that it was not shown that he had speculated in barley at all. But it appeared that he was a dealer in that grain; and there being nothing to indicate that the question was, put in an offensive sense, but only to test his skill in judging of qualities, we think it should have been answered. For these errors a new trial must be ordered, with the costs of this court.

The other Justices concurred.

The People on the relation of Charles W. Jones v.
Theodore H. Wright.

School moneys: Town treasurers: Action of town board. The statute (Comp. L., § 1025) expressly requiring the township treasurer to pay the amount of taxes raised for school purposes to the order of the school district officers, his liability therefor is distinct from his ordinary liability for township moneys, and cannot be released or in any way affected by the action of the town board.

Town treasurer: School moneys: Orders taken in payment of taxes. A township treasurer has no right to receive for school moneys any thing which the law has not authorized to be so received, and if he chooses to do so and to receipt for the taxes, he must make good the amount.

Submitted on briefs June 20. Decided June 21.

Application for *mandamus*.

JONES v. WRIGHT.

White & Haight, for relator.

E. N. Fitch, for respondent.

CAMPBELL, J:

A *mandamus* is asked to compel respondent to pay over to relator the sum of one hundred and seventy-two dollars and twenty-two cents of school moneys which he has collected and failed to pay over on proper demand.

His excuse for not paying is, *first*, that owing to the poverty of the inhabitants he accepted various local orders from them instead of money, and has no money on hand; and, *second*, that he has had a settlement of accounts with the township, which makes him a creditor instead of a debtor to the town.

The statute is express that the township treasurer shall pay the amount raised for school purposes to the order of the school district officers.—*C. L.*, § 1025.

This liability is distinct from his ordinary liability for township moneys, which by the same statute are subject to orders of the township board.

The liability for school moneys cannot be released or in any way affected by the action of the township board, and he can set up no action of that sort as a discharge or an excuse for not responding to the school authorities.

So far as his collections are concerned, he has no right to receive for school moneys any thing which the law has not authorized to be so received, and if he chooses to do so and to receipt for the taxes, he must make good the amount.—*Elliott v. Miller*, 8 Mich., 132.

The *mandamus* must issue as prayed.

The other Justices concurred.

JONES v. JUDGE OF KENT CIRCUIT.

The People on the relation of Cyrus Jones v. The
Judge of the Kent Circuit.

Mandamus: Practice. *Mandamus* is denied where the record fails to show upon what papers the circuit judge based his action which is sought to be reviewed.

Submitted on briefs and decided June 21.

Application for *mandamus*.

Thompson & Pratt, for relator.

Taggart, Allen & Wolcott, for respondent.

COOLEY, CH. J:

The application for a *mandamus* in this case is denied without an examination of the merits, for the reason that there is no return of the circuit judge showing upon what papers the transfer of the case from the circuit to the superior court was made. We are unwilling to decide cases upon such imperfect records, when our action would be equivalent to a review of the rulings of another court without knowing what that court based its action upon.

The other Justices concurred.

OCTOBER TERM, 1876.

James P. Chapman v. Charles Dease.

Lumbering contract: Failure of performance: Both parties in default: Damages: Profits. Under a lumbering contract the vendor, who has come short of complete performance and detained some logs that were ready for delivery, is held not entitled to recover for profits which would have accrued to him had he cut and delivered the contract quantity of logs, upon the claim that he was disabled from getting the full quantity by reason of the purchaser's failure to advance as he agreed.

Lumbering contracts: Plaintiff in default: Logs delivered and appropriated: Measure of recovery. Where under a lumbering contract the purchaser has been in fault in the times and amounts of his advances, but which have nevertheless been received, and the vendor has been in fault in the quantity and quality of the logs delivered, which, however, have been accepted and appropriated by the purchaser, the vendor may recover the value, not exceeding the contract price, of the logs so delivered and accepted and not paid for by the advances, less any damages suffered by the purchaser by reason of the vendor's default.

Quantum valebat: Limit of recovery: Contract price: Value. The limit of recovery in such case could not exceed either the contract price or the true value at the time and place of delivery and acceptance.

Quantum valebat: Basis of recovery: Contract. The recovery on the *quantum valebat* for the value of chattels delivered and accepted in pursuance of a contract which the plaintiff has failed to completely perform on his part, is not based on the contract, but upon the benefit which the defendant has received from the appropriation of the property of the plaintiff.

Quantum valebat: Measure of damages: Recoupment. The plaintiff's recovery in such an action being upon the basis of the true value of the property delivered and accepted, the defendant would not be entitled by way of recoupment to have this value reduced by the excess in value of the contract quality, but would be permitted to set up a counter claim for the difference between the contract price and the market value of the contract quality of the amount so delivered.

Quantum valebat: Logs: Sales: Advances: Recoupment: Damages. A vendee in a lumbering contract, who has failed to make advances according to his contract, cannot, when sued by his vendor on the *quantum valebat* for logs delivered and appropriated, recoup damages for the non-delivery of logs which by such default the vendor was disabled from delivering.

Log contract: Percentage of uppers: Scaler. The contract in question, providing that the logs shall be "No. 1 and 2 in quality and free from defects, and are at least to run twenty-five per cent. into the upper qualities,"

CHAPMAN v. DEASE.

and be "scaled as fast as banked, by some person to be mutually agreed upon," is held not to empower the scaler to go into the percentage and to conclude the parties in that respect by his scale.

Heard June 14. Decided October 4.

Error to Saginaw Circuit.

Holmes, Collins & Stoddard, for plaintiff in error.

Thompson & Tarsney, for defendant in error.

GRAVES, J:

These parties entered into a written contract of the following tenor:

"This agreement, made this twenty-first day of August, A. D. 1874, between Charles Dease, of Lakeport, St. Clair county, Michigan, of the first part, and James P. Chapman, of Bay City, Michigan, of the second part, witnesseth:

"First party agrees to sell, and hereby does sell, to second party from one to two million feet of white pine saw logs, at and for the price of nine and one-half dollars per thousand feet, delivered to the Cass River Boom Company.

"First party agrees to cut, haul, and put said logs into the east branch of White creek, and into the south branch of Cass River during the ensuing fall and winter, and to deliver them to the said Cass River Boom Company, as early as possible in the spring of 1875.

"Said logs are to be cut in lengths as directed by said second party, and are to be No. 1 and 2 quality, and free from defects, and are, at least, to run twenty-five per cent. into the upper qualities; said logs to be marked as fast as banked, and with such marks or mark as second party may direct; said marking to be by stamping into the end of each log. And said logs, as fast as cut, are to be and remain the property of said second party.

"Second party hereby buys said logs at said price, and for the purpose of enabling first party to commence operations, and to carry on said cutting, hauling, etc., agrees to

CHAPMAN v. DEASE.

make the following advances to first party, viz.: One thousand dollars down; one thousand dollars on the first day of October next; one thousand dollars November first; one thousand five hundred dollars December first; one thousand five hundred dollars January first next; one thousand five hundred dollars February first; one thousand five hundred dollars March first; one thousand five hundred dollars April first; and one thousand five hundred dollars May first, 1875. And said second party hereby agrees to pay any balance there may be due for logs delivered, after deducting said advances, in three equal payments of two, four and six months from said May 1st, 1875.

"Said logs to be scaled as fast as banked, by some person to be mutually agreed upon. First party to pay second party interest at the rate of ten per cent. per annum, on all advances made as aforesaid, from the time each advance is made until all said logs are delivered. And it is hereby agreed and mutually understood that above advances are on the basis of first party delivering two million feet of contracted pino saw-logs as aforesaid, and in case, by the first day of March next, there should not have been banked and marked as aforesaid more than one million feet of contract logs, then, in that case, said March advances, and all advances thereafter, are not to be made; but first party is to receive any balance there may be due on logs delivered, in three equal payments of two, four and six months as aforesaid; and in case more than one million feet should have been delivered by said March first, and still an amount not equal to two million feet, then, and in that case, there is to be a *pro rata* deduction on said March advance and all advances thereafter. But in case the amount banked by said March first equals one and a half million feet of contract logs, then all advances to be made as aforesaid.

"Said logs are to be cut from lands owned by first party, described as follows: north half of north half of section twenty-nine; south half of south half of section twenty-one; east half of northeast quarter of section fourteen; west half

CHAPMAN v. DEASE.

of southeast quarter of section fourteen, and southeast quarter of southeast quarter of section fourteen; northeast quarter of northeast quarter of section twenty-three; southeast quarter of northeast quarter of section ten; northeast quarter of southeast quarter of section ten; west half of northeast quarter of section ten; south half of northwest quarter of section ten; northwest quarter of northwest quarter of section ten; northeast quarter of section fifteen; east half of northwest quarter of section fifteen; northwest quarter of southeast quarter of section fifteen; northeast quarter of southwest quarter of section fifteen; northeast quarter of northeast quarter of section thirty; northeast quarter of northeast quarter of section twenty-two; southeast quarter of southwest quarter of section twenty-two; all in town twelve north, of range twelve east. And a portion of said logs are to be purchased by first party of others.

“(Signed)

CHARLES DEASE,
JAMES P. CHAPMAN.”

Dease sued by attachment in May, 1875, and declared for goods sold and delivered, and added two special counts on the written contract.

By these special counts he sought to recover for profits which would have accrued to him in case he had obtained the contract quantity of logs, and which he was disabled from getting, as he claimed, by Chapman's failure to advance as he had agreed.

Chapman pleaded the general issue and gave notice that he should insist that the logs sued for were sold to him under the written contract referred to; that the whole quantity of logs actually delivered did not exceed 950,000 feet; that before suit he had advanced and paid eight thousand and twenty-one dollars, including interest; that the logs so furnished, instead of being number one and number two in quality, and free from defects, were inferior thereto and ran below twenty-five per cent. to the uppers, and not to exceed eighteen per cent.; that in consequence he suffered damage

CHAPMAN v. DEASE.

to the amount of five thousand dollars, which he should claim to recoup.

The written contract was thus drawn into the controversy by both sides and was admitted.

Considerable testimony was adduced in connection with the special counts, but as we understand the record the jury were instructed that no recovery was allowable upon them, and this was proper.

Dease's right to recover was therefore left to depend upon the existence of a state of facts sufficient to support the common count, and under the judge's rulings the jury gave him a verdict for three thousand eight hundred and seventy-seven dollars. Each party accused the other of a substantial breach of the special agreement, and also insisted that the charge against himself was sufficiently explained and answered, and the claims and counter claims were confusing. There is no question but that both parties entered upon performance of the express contract and respectively fell short of compliance with its terms. Chapman's agreement was absolute to advance in given sums and at named dates before March 1st, 1875, the sum of seven thousand five hundred dollars. He actually advanced a large amount, but less than he promised, and not at the times or in the sums specified. Dease actually delivered a large quantity of logs, but not as many as he promised to deliver, and in fact he retired from the contract. He claimed that Chapman's default in advancing justified him in stopping, and Chapman retorted that Dease assented to the course taken as to advances and waived objections. Chapman further claimed that the non-delivery of 27,000 feet of the logs banked and scaled was not explained at all, and was certainly not owing to want of funds. The record indicates, though not plainly, that whether or not Dease assented to Chapman's course respecting advances, was submitted to the jury and found in Dease's favor. But the point is unimportant now, because on this record it must be taken that the non-delivery of the 27,000 feet was not caused by want

CHAPMAN v. DEASE.

of money, and hence was not owing to any default of which Chapman was guilty concerning advances. As the record is understood, only 960,000 feet, at the outside, passed the scaling, leaving 40,000 feet short at that stage, and the 27,000 feet, being parcel of the scaled 960,000 feet, was kept back on delivery, making a total deficit of 67,000 feet. On any theory this 27,000 feet should have been delivered. Dease's position was, *first*, that he had procured these logs, had banked them, that they had been scaled, and that they actually conformed to the contract, and that nothing remained but to hand them over; and, *second*, that the effect of Chapman's failure to advance as agreed was not to disable him from handing them over with those actually delivered, but it was to prevent him from cutting, hauling, and delivering 400,000 feet and over of his own timber, which, in fact, he did not get at all, and to induce him subsequently and finally to abandon the contract. Hence there was no excuse in theory or fact applicable to this 27,000 feet.

Now by the very terms of the contract the logs as fast as cut were to become and remain the property of Chapman, and any abandonment of the contract by Dease could only consist in abstaining from delivery of logs Chapman already owned. The logs would still belong to Chapman. Neither his default nor Dease's abandonment could change the title back to Dease. Dease had, then, delivered under color of the contract a large amount of logs, but less by sixty-seven thousand feet than the contract called for, and had refused to go further, and for the non-delivery of twenty-seven thousand feet of this deficit there was no shadow of excuse. The logs actually delivered had been received by Chapman and applied to his use. At the same time he had advanced in furtherance of the contract large sums of money, but not as much in the aggregate as the contract required, or in the sums or by the times specified. Dease had accepted this money and applied it to his own use.

In this state of things Dease was at liberty to base a claim for the value, on Chapman's acceptance and appropri-

CHAPMAN V. DEASE.

ation of such logs as were actually delivered, whatever their quality; but the principle permitting him to do so would require the application of such rules as would hinder the remedy from leading to unwarrantable results.—*Wilson v. Wagar*, 26 Mich., 452; *Allen v. McKibbin*, 5 Mich., 449; *Kearney v. Doyle*, 22 Mich., 294; *Begole v. McKenzie*, 26 Mich., 470.

We have seen the agreed price was nine dollars and fifty cents, but this was to be due only for logs of the prescribed quality and after delivery, and Dease could recover no more than the contract price in any event for the logs he did deliver. He could only recover this much in a suit for damages on the contract, brought upon full performance; and being in default, as he certainly was as to quantity, if not likewise as to quality, he can be no better off in his suit on the common count for value.

His counting on the contract is not very consistent with his claim of having abandoned it.

Under the demand made by the common count the contract price fixes the outside limit; but the very nature of the demand in this form requires that the amount shall be ascertained upon the basis of true valuation at the time and place of acceptance of the very logs delivered, and this true value, if less than the contract price, must be the actual limit. Dease is restricted to the contract price in any contingency, and is absolutely restricted to the true value in the contingency of that being less than the contract price.

Against the amount so ascertained upon the principle of valuation, Chapman must have allowances.

First, as to the advances. In the understanding of the parties these advances were to be ten per cent. loans until delivery, at which time they were to apply as payments. These, with the agreed interest, should be allowed to Chapman.

Second, as to allowances for defect in quality. The ascertainment of the true value of the logs delivered, necessarily involved the ascertainment of their real quality, and

CHAPMAN v. DEASE.

as the action was for this value, a determination of the fact of actual quality was hence requisite on this side of the case. Again, the existence of the alleged falling short in quality from the contract requirement, the extent of it, and the allowance proper on account of it, were matters to be ascertained under Chapman's counter claim.

It was urged by Dease, and ruled by the judge, that by force of the contract clause concerning the scaling the doings of the scalers operated as a conclusive decision that the logs which they approved were sufficient to run twenty-five per cent. to uppers, and hence that this subject was absolutely closed. This compelled the jury to value the logs, on Dease's claim for their value, upon the assumption that they were actually of such high quality, and on the other hand excluded all question under the counter claim as to the fact of their being inferior to the contract quality, the degree of inferiority, if any, and the amount of injury to Chapman caused by it. We think the court erred. Dease's ground of recovery as the case stood was outside of the written contract, and not on it. He claimed to have thrown it up and to have been justified in doing so, and insisted upon his right to recover upon a theory which ignored the contract as a law for the parties. How then could he appeal to the clause in question? But without dwelling on this view, we think this provision gave no power to the scalers to go into the percentage.—*Ortman v. Green*, 26 Mich., 209. As before observed, the basis of Dease's right under the common count is the true value of the same logs he delivered, and in adjusting that value due consideration must be given to the actual quality. Hence in the estimate under the common count an allowance must be made for any insufficiency there may have been in the logs to run twenty-five per cent. to upper qualities. But this allowance being made in getting at the value of the delivered logs, under the common count, must not be made again under Chapman's counter claim. The value upon the common count is fixed apart from the special contract, though recovery would be limited

CHAPMAN v. DEASE.

by the price prescribed in the contract. But Chapman's damage to be recouped must be such as arises under the contract. Being charged with only the real value of the delivered logs, he gets them at what they were worth to him, and in so far is not damnified. By the special contract he could only get logs running twenty-five per cent. to uppers by paying nine dollars and fifty cents, and if, at the time and place of delivery, logs of that sort were worth no more, he was not damnified even if the logs delivered were of lower grade. But if such logs were at such time worth more than nine dollars and fifty cents, at which Dease was bound to deliver them for, and the logs delivered were inferior, then Chapman incurred damage under the contract equal to the difference between nine dollars and fifty cents and the value of such logs as were agreed for, and this is recoverable under the counter claim. And as the question of percentage is not left to the scalers, it must be ascertained by the jury, together with the amount of the difference, if any.

Chapman's failure to advance as he agreed prevents him from recouping damage for the non-delivery of the logs which were not delivered.

The rulings of the court below need not be separately noticed. They were contrary to the views we have expressed in regard to the criterion and measure of the respective claims, and must have led to an improper result. How the facts liable to be controverted will appear upon another trial cannot be anticipated.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

HAYES v. LIVINGSTON.

Martin Hayes v. Stillman Livingston.

Estoppel in pais: Title to land: Statute of frauds. The doctrine of estoppel in pais is not as broadly applicable to cases involving the legal title to real estate as to those where only personalty is in question, the proviso of the statute of frauds, that interests in lands shall not be created or transferred otherwise than by deed, operating as a limitation upon the doctrine.

Equity jurisprudence: Fraud: Release: Estoppel. The remedy administered in equity, of compelling a release as for a fraud, is sustainable without the aid of the doctrine of estoppel, and these cases are therefore not in point upon the question under consideration.

Boundary lines: Estoppel: Transfer of title. The application of the doctrine of estoppel to voluntary adjustments of boundaries between contiguous estates, is not within the objection to its adoption in cases of transfers of title, since here the title is not supposed to be affected, but only the limit of the respective ownerships.

Dedication of lands to public use: Statute of frauds: Estoppel. Cases of the dedication of lands to public uses are not precedents for the application of the doctrine of estoppel in violation of the aforesaid proviso of the statute of frauds, for dedications are not within that statute.

Equity jurisprudence: Fraud: Ejectment: Legal title: Estoppel in pais. While it is a recognized ground of equitable relief to compel the owner of lands to surrender them up to one who by reliance upon such owner's fraudulent conduct has been misled into taking action which gives him a superior equity, yet at law the legal title must prevail, and under the statute of frauds it is not permissible that an estoppel resting in parol should work a transfer of the legal title to lands.

Heard June 15. Decided October 4.

Error to Montcalm Circuit.

William O. Webster, for plaintiff in error, argued that the legal title to land cannot pass by parol under the provisions of our statute: *Comp. L. 1871, § 4692*; that in ejectment the legal title only, and the right of possession under it, is involved, and an equitable title, however clear and indisputable, will not support the action: *Tyler on Ejectment, 75*; *Adams on Ejectment, 32*; *2 Greenl. on Ev., § 331*; *McPherson v. Walters, 16 Ala., 714*; *Hamlin v. Hamlin, 19 Me., 141*; *Dela-plaine v. Hitchcock, 6 Hill, 14*; *Whitney v. Holmes, 15 Mass., 152*; *Ryder v. Flanders, 30 Mich., 336*; that the legal title cannot be parted with by mere waiver, or

HAYES v. LIVINGSTON.

transferred by an estoppel resting in parol: *Gugins v. Van Gorder*, 10 Mich., 523; *Whiting v. Butler*, 29 Mich., 122; *Smith v. Mundy*, 18 Ala., 182; *Gimon v. Davis*, 36 Ala., 589; *Jackson v. Demont*, 9 Johns., 60; *Swick v. Sears*, 1 Hill, 18; *Mills v. Graves*, 38 Ill., 455; *Wales v. Boyne*, 31 Ill., 464; *Blake v. Fosh*, 44 Ill., 302; *Hurd v. Cushing*, 7 Pick., 176; *Heard v. Hall*, 16 Pick., 457; *Hale v. Skinner*, 117 Mass.

Mitchel & Pratt, for defendant in error, conceding that where, as in this state, the distinction between legal and equitable jurisdiction is kept up, the legal title, so far as relates to the right of possession, must prevail, argued that a plaintiff in ejectment makes out a case when he shows title or right of possession, or any state of facts which estops the defendant from denying his title or right of possession: *Gugins v. Van Gorder*, 10 Mich., 523; *Clee v. Seaman*, 21 Mich., 287; that equity will not permit the statute of frauds to be used as a means of promoting the fraud it was designed to prevent, and that the doctrine of equitable estoppel should be adopted in legal tribunals and applied as broadly as in courts of equity: 2 *Smith L. C.*, 651; *Rangeley v. Spring*, 21 Me., 137; that an award upon a parol submission to arbitration of disputed titles, has been held to operate by way of estoppel to preclude either party from asserting title in opposition to the award: *Robertson v. McNeil*, 12 Wend., 378; *Clark v. Whithers*, 19 Wend., 320; *Cary v. Wilcocks*, 6 N. H., 177; *Doe dem. v. Rasser*, 3 East, 15; *Bigelow on Est.*, 607; that examples are abundant where in cases of dedications the owner has been held estopped by acts *in pais* from asserting his title to land; and see *Cleland v. Taylor*, 3 Mich., 301; and upon the main proposition, the following authorities are cited: *Bigelow on Est.*, 606-7; *Hatch v. Kimball*, 16 Me., 146; *Morse v. Child*, 6 N. H., 521; *Thomson v. San-*

HAYES v. LIVINGSTON.

born, 11 N. H., 201; *Shaw v. Beebe*, 35 Vt., 203; *Halloran v. Whitcomb*, 43 Vt., 306; *Brown v. Wheeler*, 17 Conn., 345; *Johnson v. Conn. Bk.*, 21 Conn., 21; *Sayles v. Smith*, 12 Wend., 57; *Presbyterian, etc., v. Williams*, 9 Wend., 147; *Cockerill v. Landers*, 44 Barb., 218; *Medley v. Williams*, 7 Gill & J., 61; 6 *Harris*, 343; *Clark v. Driggs*, 6 Ired., 159; *Duncan v. Duncan*, 3 Ired., 317; *Pool v. Lewis*, 41 Ga., 162; *Burkhalter v. Edwards*, 16 Ga., 593; *Thompson v. Wheatly*, 8 S. & M., 499; *Winnie v. Cole*, 1 Miss., 119; *Doe v. Pritchard*, 11 S. & M., 327; *Leland v. Wilson*, 34 Tex., 39; *Cornelius v. Burford*, 28 Id., 202; *Morrison v. Keeler*, 13 L. A., 543; *Davison v. Sillman*, 24 L. A., 225; *Spear v. Walker*, 1 Head, 166; *Merriweather v. Larmor*, 3 Sneed, 447; *McAfferty v. Conover*, 7 O. St., 99; *Shaw v. Potter*, 50 Mo., 278; *Fair v. Howard*, 6 Nev., 304; *Davis v. Davis*, 26 Cal., 23.

COOLEY, CH. J.:

In the court below Livingston recovered a judgment in ejectment on the strength of an estoppel *in pais*. His case was, that Hayes, whose title to the land at a former time was conceded, had given two mortgages upon it, one of which had been foreclosed under the power of sale, and the land sold to a third party; that the other being hold by one Corey, an arrangement was made between him and Hayes, under which Corey was to buy up the title under the foreclosure, and then when he should be able to find a purchaser, sell the land and from the proceeds take out the amount of his mortgage and the amount he should have paid for the foreclosure title, and pay over the remainder to Hayes; that this arrangement was carried out so far as concerned the purchase of the foreclosure title, and that subsequently Corey sold to Livingston, being first told to do so by Hayes, and Livingston not making the purchase until

HAYES v. LIVINGSTON.

assured by Hayes that the land was Corey's, though the latter was to pay over to Hayes a surplus from the purchase price when the sale was made. This case was disputed by Hayes, who claimed that whatever was paid by Corey in acquiring the foreclosure title was only a loan to be repaid with interest. The dispute as to these facts would not have been important in the ejectment suit had the foreclosure title proved to be valid, but it was claimed on one side, and conceded on the other, that it was defective, and left the legal title in Hayes. But Livingston insisted that Hayes, by his arrangement with Corey, and by telling Livingston, after Corey bought, that the latter was owner, had estopped himself from setting up any title in opposition to that which Livingston had acquired in reliance upon his own statement; and the circuit judge so instructed the jury. The jury having found the facts to be as claimed by Livingston, a verdict and judgment in his favor followed as of course.

If the rule of estoppel *in pais* is the same when the right to real property is involved as it is when only personalty is in question, the circuit judge was undoubtedly right in his instruction. The principle is so old that it has ceased to be brought into controversy, that when one has knowledge that his own chattels are being sold as the property of another, and encourages the sale without asserting his right, or even by his silence allows a purchase to be made in ignorance of his title, he shall not thereafter be permitted to assert such title to the prejudice of the purchaser. The rule is as sound in morals as it is indisputable in point of law; and has often been recognized in this court.—*Dann v. Cudney*, 13 Mich., 239; *Truesdail v. Ward*, 24 Mich., 117; *Meister v. Birney*, 24 Mich., 435.

But a difficulty arises when it is proposed to apply the same principle to real estate. The statute of frauds is express that no interests in lands, with certain exceptions which are unimportant here, shall be created or transferred otherwise than by deed; and although it is perfectly true, as is shown by Mr. Bigelow in his treatise on the law of estop-

HAYES v. LIVINGSTON.

pel (*p. 606*), that where one by his conduct is precluded in law from asserting his title in property, there is strictly no transmission of title, yet this is a mere technicality; the legal consequences are precisely the same, and for all practical purposes the estoppel works a conveyance. It would hardly be creditable to the administration of the law if the application of a statute so important as the statute of frauds should be turned away and defeated by a technicality so shadowy and unsubstantial.

It is not to be denied, however, that there are several cases which apply the doctrine of estoppel indiscriminately to both real and personal estate. The cases in Maine are very decided.—*Hatch v. Kimball*, 16 Me., 146; *Durham v. Alden*, 20 Me., 228; *Rangeley v. Spring*, 21 Me., 137; *Copeland v. Copeland*, 28 Me., 525; *Stevens v. McNamara*, 36 Me., 176; *Bigelow v. Foss*, 59 Me., 162. These cases appear to have overruled *Hamlin v. Hamlin*, 19 Me., 141. The following are usually referred to as supporting the Maine cases: *McCune v. McMichael*, 29 Geo., 312; *Beaupland v. McKeen*, 28 Penn. St., 124; *Shaw v. Beebe*, 35 Vt., 205; *Brown v. Wheeler*, 17 Conn., 345; *Brown v. Bowen*, 30 N. Y., 519; *Barham v. Turbeville*, 1 Swan, 437. Of these the Georgia case related to a parol partition of slaves acquiesced in until after the death of one of the parties, and was decided without any discussion of or reference to the distinctions between real and personal estate. The case in Pennsylvania was a suit on a promissory note given on a purchase of lands, the payment of which was resisted on the ground of failure of title. The persons in whom the title was alleged to be had been the plaintiff's agents in the sale, and had been paid a commission for making it; and they were held to be estopped from denying the plaintiff's right. It is to be observed of this case that the title was only incidentally in question, and also that in Pennsylvania the distinction between legal and equitable remedies is not kept up. In the Vermont case the court is contented to dispose of the question very briefly by saying

HAYES v. LIVINGSTON.

that the rule of estoppel which is applied to personal property "upon reason and principle, to prevent fraud and promote justice, should be extended to real property." It would have been more satisfactory if the court had pointed out on what grounds, when the legislature, "to prevent frauds and promote justice," had applied wholly different rules to the transfer of personal property and of real property, the courts could justify their action in venturing to abolish the distinction. The Connecticut case was one in which the question of estoppel related to a distribution of property which, though not in pursuance of the statute, had been sanctioned by a written agreement of the parties. In the New York case the complaint was of the flooding of the plaintiff's mill by a dam which set the water back upon it; and the question was, whether the defendants were estopped from asserting title to the land on which the mill stood, by the fact that their ancestor through whom they claimed had asserted no right at the time the plaintiffs bought the land and built the mill, though aware of all the facts. The case was begun and tried under the code, which does away with the distinction between legal and equitable actions. The case in Swan goes to the extreme of sustaining an estoppel against an infant, and certainly would not be followed in this state.—*Ryder v. Flanders*, 30 Mich., 336.

Some other cases may be mentioned which we think are distinguishable, though in some of them a doctrine is asserted as broad as that which is maintained by the cases in Maine. *Blackwood v. Jones*, 4 Jones Eq., 56, was a case where one by his conduct was held estopped from asserting a lien upon lands. Besides being in equity, it may be said of the case that what was in dispute was not the title, but something supposed to encumber it. *Water's Appeal* (35 Penn. St., 523) was where the estoppel related to a claim to surplus moneys on a sale of lands. *Stevens v. Dennett*, 51 N. H., 324, was one where the doctrine was applied to the use of a well on the land of another, to which the party claimed right by user. *Winchell v. Edwards*, 57 Ill., 41,

HAYES v. LIVINGSTON.

was a case in which it was held that one was precluded from asserting a secret equitable title as against the legal title, and is obviously not in point. *Pool v. Lewis*, 41 Geo., 162, was one in which the estoppel concerned the right to rely upon a verbal agreement concerning the flow of water in a natural water-course, and like the last, has no application. *Mariner v. Milwaukee, etc., R. R. Co.*, 26 Wis., 84, was a case of election between taking lands and taking moneys. *Platt v. Squire*, 12 Met., 494, was one where the question was as to the actual payment of a mortgage. *Gill v. Denton*, 71 N. C., 341, was where an officer who had induced a person to buy lands by representing them to be free from liens, was held estopped from afterwards claiming the lands on a purchase under an execution which was held by him when the representations were made. Manifestly neither this case nor that in Metcalf involves the question we are now considering.

The following were either cases in equity or cases in which, under permission of the statute, an equitable defense was relied upon: *Wendell v. Van Rensselaer*, 1 Johns. Ch., 344; *Storrs v. Barker*, 6 Johns. Ch., 166; *Tilton v. Nelson*, 27 Barb., 595; *Barnes v. McKay*, 7 Ind., 301; *Snodgrass v. Ricketts*, 13 Cal., 359; *Fay v. Valentine*, 12 Pick., 40; *Foster v. Bigelow*, 24 Iowa, 379; *Junction R. R. Co. v. Harpold*, 19 Ind., 350; *Burns v. Taylor*, 23 Ala., 255; *Newsome v. Collins*, 43 Ala., 656. These cases have no necessary bearing, and their correctness may be conceded. Equity may always compel the owner of the title to release it where that is the proper redress for a fraud committed by him in respect to the title; but the remedy is properly administered by compelling the fraudulent owner to convey, instead of treating the case as one of estoppel in the strict sense.

The following were cases in which the doctrine of estoppel was applied to a voluntary adjustment of boundaries between contiguous estates: *Robinson v. Justice*, 2 Penn., 19; *Spiller v. Scribner*, 36 Vt., 245; *Halloran v. Whitcomb*, 43 Vt.,

HAYES v. LIVINGSTON.

306; *Merriwether v. Larmon*, 3 *Sneed*, 447; *Spears v. Walker*, 1 *Head*, 166; *McAfferty v. Conover*, 7 *Ohio N. S.*, 99; *Gove v. White*, 23 *Wis.*, 282. The principle of these cases has been approved in this state.—*Reed v. Drake*, 29 *Mich.*, 222; *Stewart v. Carleton*, 31 *Mich.*, 270. It is not supposed that in such cases the title is affected. The parties have only by their agreement and conduct determined the limits of their respective ownerships. Cases like that of *Noyes v. Ward*, 19 *Conn.*, 250, which was one of the dedication of lands to public uses, have no application, because dedications are not within the statute of frauds. They would not be referred to at all but for the fact that they are sometimes spoken of as cases of estoppel. *Gugins v. Van Gorder*, 10 *Mich.*, 523, on which some reliance is placed in this case, is not at all in point. In that case the grantee in an unrecorded deed had consented to its destruction, and to the conveyance of the land described therein to a third party, who, by recording his deed, became the apparent owner of a record title, as he was unquestionably the owner in equity. Afterwards a title was asserted under the destroyed deed, and the question was of the right to introduce parol evidence of its existence and destruction. Justice Manning, after pointing out that the case was within the statute of frauds, and that the destruction of the deed did not affect the title, proceeded to say: "Secondary evidence cannot be received to prove a fact without first laying a foundation for it in accounting for the absence of that which is primary. The deed to Goodrich is the best evidence of title. This is not produced, and its destruction is accounted for in a way that shows it would be dishonest in him to claim any thing under it. It was destroyed in pursuance of an agreement between him and his grantors, after the purchase money had been returned to him, with a view of revesting the title. It was done with his consent and for a valuable consideration. The law will not recognize such a state of facts as an excuse for the non-production of the deed. Its language to Goodrich would be, if he was

HAYES v. LIVINGSTON.

defending, 'Sir, you are estopped by your own acts from proving the contents of the deed by parol evidence;' and the defendant who claims through him has no greater rights than he." It thus appears that the only question in the case was one of primary and secondary evidence. Had the deed, when the transaction took place, been laid aside instead of being destroyed, and subsequently been brought forward and relied upon, the case would have been wholly different, and nothing said by Justice Manning would have had application. In such a case the right of property would have been involved; in the case actually considered it was only the quality of the evidence to establish the right.

The following cases have more or less bearing on the question involved in this suit. In *Jackson v. Shearman*, 6 Johns., 19, 21, it is said by the court that parol acknowledgments as to the title to real property "are generally a dangerous species of evidence; and though good to support a tenancy, or to satisfy doubts in cases of possession, they ought not to be received as evidence of title. This would be to counteract the beneficial purposes of the statute of frauds." In *Jackson v. Vosburgh*, 7 Johns., 186, parol evidence of a disclaimer of title was rejected on the same ground. In *Wright v. DeGroof*, 14 Mich., 164, it was decided by this court that an estoppel could not be made out against a widow's claim to dower, by showing that she, as administratrix of her husband's estate, had sold the land and agreed to assert no claim on her own behalf. In *Parker v. Barker*, 2 Met., 423, a parol promise to release a mortgage interest in lands was held inoperative, although acted upon; the case corresponding in principle with the one last cited. The point here involved was directly passed upon in *Swick v. Sears*, 1 Hill, 17, 19. There, in reviewing a trial in ejectment, *Bronson, J.*, says: "Evidence was offered to show that the plaintiff stood by and not only saw the defendant buy of others, but advised him to do so, without disclosing the title which he now sets up. The evidence was properly rejected. The plaintiff is not estopped in a

HAYES v. LIVINGSTON.

court of law to assert his title." "If the defendant finds it necessary to rely upon this part of the case, he must go into a court of equity." This case is not referred to in the subsequent case of *Brown v. Bowen*, 30 N. Y., 509, and it is to be presumed that the last case was supposed to be distinguishable. In *Davis v. Davis*, 26 Cal., 23, while it was not decided that the doctrine of estoppel was inapplicable where the title to real estate was in question, the danger of applying it to the overthrow of the statute of frauds was very distinctly pointed out. The question is distinctly met in *Doe v. Walters*, 16 Ala., 714, in which it is said by *Dargan, Ch. J.*, delivering the opinion of the court, that "the title to land can pass only by deed, and an estoppel at law, which works a divesture of title, can be created, in my opinion, only by as high evidence. I have looked with some care into the English cases, but I have not found one in which a plaintiff at law was held to be bound by a parol estoppel, when the subject matter was such that the title could pass only by deed. If the title could pass by delivery, or by parol, then a party shall be bound by a parol estoppel;" and the learned judge quotes, among other cases, that of *Knight v. Wall*, 2 Dev. & Bat., as deciding that "title to slaves could not be made out at law by a parol estoppel; and if fraud had been practiced on the party, he must seek his redress in equity." To this effect also, *West v. Tilghman*, 9 Ired., 163, may be referred to. And as to the doctrine in Alabama, further reference may be made to *Smith v. Mundy*, 18 Ala., 182. The decisions in Illinois are equally clear and pointed. In *Mills v. Graves*, 38 Ill., 455, 466, where the precise question was involved, *Walker, Ch. J.*, says: "Had the acts which were proved constituted an estoppel, it would have been simply an equitable right, incapable of assertion in a court of law.—*Wales v. Boyne*, 31 Ill., 464. There can be no pretense that mere oral declaration can ever transfer the legal title; and equitable titles and demands are not cognizable in a court of law. Even if this were such an estoppel as the defend-

HAYES v. LIVINGSTON.

ant claims, the legal title is in Ellis' heirs or grantees. After a careful examination of the adjudged cases, we are unable to find that such estoppels can be made available in a court of law. Estoppels relating to real estate, so far as we can find, have been uniformly enforced in courts of equity, and usually by injunction; and this is manifestly in accordance with the analogies of the law." In *Blake v. Fash*, 44 Ill., 302, this doctrine is reaffirmed by Mr. Justice Breese, speaking for the court. It also had the approval of this court in *Ryder v. Flanders*, 30 Mich., 336, 344, where it was distinctly denied in an opinion by Mr. Justice Christiancy that an equitable estoppel can constitute a defense at law.

Upon this statement of the cases it is apparent that while there are authorities both ways, it cannot be said that the weight of authority is with the ruling below, unless the cases of settlement of boundary lines and those of dedication are in point. The first have not usually been disposed of on that ground, but, on the contrary, such settlements, when acquiesced in, are supported for the very reason that they pass no title, but only define what it is that the title embraces. And surely cases of dedication are foreign to this question. A dedication is in one sense a conveyance, but it is neither within the mischiefs the statute of frauds was aimed at, nor does the statute come in question in making it out. It is a gift publicly made with tender of possession, and publicly accepted; and is as free from a likelihood of being affected by frauds and perjuries as almost any supposable case; and it is as well made out by oral declarations as by any formal conveyance. But a grant to an individual is not suffered to be thus made; if it were it would be needless to invoke the doctrine of estoppel in support of an oral transfer. Indeed, in those cases of dedication in which estoppel is discussed, it is not strictly estoppel that is in question, but rather the right of the party to recall his gift. To treat such a question as one of estoppel, is a careless use of terms. But conceding the doctrine of estoppel to apply

HAYES v. LIVINGSTON.

in cases of dedication, the question here at issue is still untouched; for here the question is, how we are to get over or evade the statute of frauds, which in cases of dedication is not involved.

The suggestion that the application of the estoppel only prevents circuitry of action, is one which overlooks the distinction between legal and equitable remedies. It may be plausibly urged that no such distinctions should be kept up; but they are kept up, and until recently in this state,—as is still the case in some others,—the practice in equity has permitted some evidence to be reached which was not available at law. This is no longer the case in this state; but there is nothing in our legislation which permits cases where one claims that equitably the title or the possession of lands should be awarded to him because of the fraud of the legal owner, to be tried as common-law cases by jury. Perhaps one reason for this may be that jurors are not likely to understand and appreciate the importance of an adherence to the statute of frauds so well as those who have been educated in a knowledge of the reasons which led to its enactment; and a jury might therefore be overready to set aside titles on parol evidence of mere words or mere failure to utter words. But whatever may be the reasons, and whether satisfactory to ourselves or not, we are not at liberty to disregard the fact that the legislation of the state still leaves equitable claims to be tried in the courts of equity. And when one asserts that the owner of land ought to surrender it to him, because of the owner's fraudulent acts and conduct, it is manifest that his claim is only an equitable claim, set up and asserted against the legal claim. The one has the legal title, and the other seeks to overthrow it by proving a superior equity. This he may be able to do in a court of equity, but we cannot admit that at law the legal title is not entitled to prevail.

Those cases in which it has been decided that a deed given by one assuming, but without authority, to be agent

HAYES v. LIVINGSTON.

for the nominal grantor cannot be ratified by parol, are not without a bearing in this connection.—*Despatch Line of Packets v. Bellamy Manf. Co.*, 12 N. H., 205, 231; *Blood v. Goodrich*, 9 Wend., 68; *Hunter v. Parker*, 7 M. & W., 322, 343. The parol ratification, especially if accompanied by an acceptance of the purchase price, is certainly sufficient to make out a case of strong equity, if that were all that was needful to the estoppel.

But apart from all authority, the reasons against such an application of the doctrine of estoppel appear to us entirely conclusive. Our title deeds are supposed to be the best possible protection to estates, and the policy of the law makes them so. They prove themselves, and the record of them is notice upon which every one may rely in bargaining for and in acquiring lands. The law does not permit the title to rest in parol, nor does it allow any thing which is evidenced by the deeds to be changed on parol testimony of promises, agreements or understandings. But by this doctrine, while the instruments of title are conceded to be indisputable, they are allowed to be set aside on parol evidence of the owner's admissions or statements, though this species of evidence is confessedly the least reliable of all which the law admits. The best evidence of title is thus allowed to be overcome and set aside by the weakest. A conversation misunderstood or falsely reported controls the most perfect chain of conveyances, and any estate—the most valuable in the land equally with the most worthless—is liable to be taken from the owner on the impression which a jury receives of the preponderance of evidence concerning words which witnesses may have imperfectly heard, or incorrectly understood, or the purport of which they may have unintentionally colored, or purposely wrenched from the real meaning in the mind of the speaker. The evils against which the statute of frauds was aimed are all here in their most threatening form; and it seems to us a trifling with the statute to refuse to apply it to a case clearly within its spirit, when in order to exclude

HAYES v. LIVINGSTON.

it from the letter it is necessary to put the title out of view and deny that it is involved, though the decision is effectually to dispose of it.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

Henry M. Youmans v. William A. Heartt.

Practice: Mistakes of jury: Computation: Motion for new trial. A court of review cannot correct mistakes made in computation by a jury; such matters should be presented to the trial court on a motion for a new trial.

Interest: Proceeds of sales: Duty to pay over. Under an arrangement whereby parties who had contracted to saw certain logs were to sell the lumber and receive the proceeds thereof, they having no right to use the proceeds beyond paying themselves their saw-bill and any other legitimate charges growing out of the business, it was their duty to pay over to the owner the proceeds of any sale within a reasonable time after they received the same, and falling in this they were properly chargeable with interest upon any balance found unaccounted for.

Application of payments: Statement of account: Disclaimer. H, having claims against two firms, of each of which B was a member, took B's notes in part payment, endorsed by a third firm of which B was also a member, and B having afterwards died, H presented his claim against the estate of B, crediting the amount of these notes as payment so as to balance one of the accounts, but at the same time submitting a written statement that in presenting his claim as he did he did not waive any rights against the survivors of either of the firms:—

Held, That considering the manner of submitting this claim against the estate in connection with such disclaimer, it is evident that H had no intention of making, and did not thereby make, any application of the payment made by the notes.

Application of payments. Where the parties do not make a specific application of moneys paid, the law will apply it usually as the justice and equity of the case may require.

Pro rata distribution of payments. The trial court having made such a distribution of the payment by notes upon the indebtedness of the two firms respectively as resulted in a *pro rata* application upon each, it cannot be said that any error was thereby committed to the prejudice of the survivors of either of said firms.

Heard June 15. Decided October 4.

Error to Saginaw Circuit.

YOUMANS v. HEARTT.

John J. Wheeler, for plaintiff in error, on the subject of interest, cited: 1 *Am. L. C.* (519), 632, *et seq.*; *Van Beuren v. Van Gaasbeck*, 4 *Cow.*, 496; *Reid v. Renns. Glass factory*, 3 *Cow.*, 393; *S. C.*, 5 *Cow.*, 587; *Smith v. Velie*, 60 *N. Y.*, 106; *Wood v. Belden*, 59 *Barb.*, 549; *Beardslee v. Horton*, 3 *Mich.*, 560; *Davis v. Horton*, 18 *Mich.*, 25; and on the subject of application of payments: 1 *Am. L. C.* (277-8, 280), 342, notes 1, 2, 3, 344, note 7, *et seq.*; *Mayor v. Patten*, 4 *Cranch*, 317; *Otto v. Klauber*, 23 *Wis.*, 474.

D. W. C. Gage, for defendant in error, cited on the subject of interest: *Reid v. Renns., etc.*, 3 *Cow.*, 393, 426; *Esterly v. Cole*, 3 *N. Y.*, 502; *Emerson v. Atwater*, 12 *Mich.*, 314; *Van Rensselaer v. Jewett*, 5 *Denio*, 135; and as to application of payments: *Allen Culver*, 3 *Denio*, 278; *Seymour v. Van Slyck*, 8 *Wend.*, 403; *Stone v. Seymour*, 15 *Wend.*, 19; *Pattison v. Hull*, 9 *Cow.*, 747; *Simpson v. Ingraham*, 2 *B. & C.*, 65.

MARSTON, J:

Heartt brought an action of assumpsit against Youmans as surviving partner of Bundy & Youmans. Bundy in his lifetime was a member of three firms: Bundy & Martindale, carrying on a shingle mill; J. F. Bundy & Co., carrying on the lumber business, except sawing; and Bundy & Youmans, owning and operating a saw mill and salt works. Heartt had business with Bundy & Martindale, and also with Bundy & Youmans, but had no business with J. F. Bundy & Co. The business of Heartt with the two firms was in 1872. Bundy & Martindale kept a separate set of books; but all the business of the other firms was kept on Bundy's books, and all the bank business of all the firms was kept in Bundy's name.

The business with Bundy & Youmans consisted first in a written contract for sawing about three million feet of logs.

YOUMANS V. HEARTT.

Bundy & Youmans were to receive the logs, manufacture them and pile the lumber on their dock convenient for shipment, and were to receive therefor four dollars per thousand for the first one million feet, and for the balance the same price they would have to pay for getting a like amount of their own logs manufactured. Heartt was to pay for the sawing as often as three hundred thousand feet was cut and piled on the dock as per estimate of both parties. There was also a verbal agreement made under which Bundy & Youmans were to sell the lumber and render the proceeds to Heartt. Under these agreements they sawed, sold and shipped over two and one-half million feet, collected and credited Heartt with the proceeds thereof as received, and charged him with the amounts paid to him or for his benefit, together with the expense of collecting the drafts received for the lumber sold, one-half the inspection bills, and at the end of the season with the entire sawbill at four dollars per thousand. These accounts were all kept upon Bundy's books and in the name of J. F. Bundy & Co. An account was made out by Bundy's clerk January 1, 1873, and sent to Heartt, which showed a balance then due Heartt of over eleven thousand dollars. Heartt afterwards, in writing Bundy, on referring to this account, intimates that there was an agreement by which he was to receive interest on balances due him. Another statement of account was made out by Bundy's clerk in January, 1874, in which Heartt was allowed interest at ten per cent. It was not shown that Bundy had authorized interest to be so computed, but rather that it was computed according to the custom in Bundy's office. Payments were made to Heartt during 1873, but leaving a balance due him January 1, 1874, of two hundred and twenty-four dollars and thirteen cents, exclusive of interest. At the same date there was due Heartt from Bundy & Martindale, excluding interest, two thousand five hundred and thirty-six dollars and eighty-seven cents. April 3, 1874, Bundy and Heartt met, and Bundy gave his two notes, endorsed by J. F. Bundy &

YOUMANS V. HEARTT.

Co., to Heartt. No application of the amount of these notes was made upon either account by either party during Bundy's lifetime. Bundy died April 15, 1874, and these notes were paid after his death.

In November, 1874, Heartt presented his claims against both firms to the commissioners on claims in the estate of Bundy, in which he claimed ten per cent. interest, and applied enough of Bundy's two notes to balance the Bundy & Youmans account. Accompanying the accounts thus submitted was a written statement that in so presenting his claim he did not waive his rights to enforce and collect the same from the firm of J. F. Bundy & Co. or the survivors thereof, or against the firm of Bundy & Martindale or the survivors thereof. It appears that at this time Heartt supposed that the firm of J. F. Bundy & Co. and Bundy & Youmans were one and the same. These claims being disallowed, he brought suits thereon. The Bundy & Martindale suit was tried first, and in this the court applied on that claim one thousand six hundred and eighty-eight dollars and sixty-seven cents of the two notes. This case was next tried and the court applied the balance of the two notes, being one thousand three hundred and fifty-three dollars and forty-two cents, and charged the jury that Heartt had made no application of the notes, and also that he was entitled to interest at seven per cent. on equated averages prior to January 1, 1874. To the charge allowing interest, and the application of the notes as made by the court, plaintiffs in error complain.

Plaintiff in error's counsel makes a computation of the accounts to show that the jury must have made a mistake in the interest allowed by them, and this contrary to the charge of the court. Even if this were so, this is not the proper place to correct that error. This matter should have been presented to the court below on a motion for a new trial. We cannot correct mistakes thus made by a jury.

I. As to the interest. Under the written contract, Heartt was to pay for the sawing as often as three hundred thou-

YOUMANS v. HEARTT.

sand feet was cut and piled on the dock. Under the verbal contract authorizing Bundy & Youmans to sell the lumber and receive the proceeds thereof, they had no right whatever to use the proceeds any further than in payment of their saw-bill in accordance with the written contract, and any other legitimate charges growing out of the relations existing between them. It was their duty, upon making a sale of lumber and receiving the proceeds thereof, to pay over to Heartt, at least within a reasonable time thereafter, the amount received, less any proper charges they might then have had against him; and failing in this respect, they were properly chargeable with interest upon any balance found unaccounted for. We also think, taking all the facts into consideration, that such was the intention of the parties, and that the defendant had no cause to complain of the charge of the court allowing interest.

II. As to the application of the amount of the notes as made by the court. It is conceded that no application was made by either of the parties, unless the accounts submitted against Bundy's estate by Heartt could be considered an application. In the accounts thus submitted, Heartt disclaimed expressly the waiver of any rights he might have against either of the firms or the survivors thereof. We must consider the entire submission as a whole; and in so doing, we see that Heartt, in submitting his accounts under such a disclaimer, had no intention of making, and did not thereby make, any application.

It is said that the judge, in the suit against Martindale, must have assumed that there was a *certain* amount due on the Bundy & Martindale account, and a *certain* amount due on the Bundy & Youmans account, neither of which facts he could then have known, and that upon such assumption he divided the amount *pro rata*. Where the parties do not make a specific appropriation of the moneys paid, the law will appropriate it usually as the justice and equity of the case may require. These notes were Bundy's, endorsed by J. F. Bundy & Co., with which firm Heartt had no deal-

YOU MANS V. HEARTT.

ings. We cannot assume that these notes were paid by the endorsers, or even if they were, that it was inequitable to apply the amount thereof upon the two accounts, both of which Bundy was equally liable to Heartt upon; and no special circumstances were shown to take this case out of the general rule. Now, whatever assumption the court may have made on the trial of the suit against Bundy & Martindale in order to then make the application which he did, it was substantially correct, as the cases now turn out. Making a *pro rata* application, it appears that the defendant in this case received his full proportion of the entire amount of the notes. This being so, he has no right to complain. If any error was committed he was not injured thereby.

The judgment must be affirmed, with costs.

The other Justices concurred.

The City of Detroit v. Patrick Laughna.

Detroit House of Correction: Misconduct of officers: Liability of city. The city of Detroit is not responsible for the misconduct of the officers of the Detroit house of correction towards the prisoners.

Detroit House of Correction: Custodian: Prisoners: Officers: State agents. Under the act of 1861, the government of the prison having been put under the control of a board of inspectors, and the common council having no voice in its internal management or in the selection of its officers, other than the superintendent, whose powers and duties are all governed by the statute, the city cannot be regarded as custodian of the prison or as jailer and guardian of the prisoners; the officers are not city agents and the city has no means of directing or of checking their action under the law, and therefore cannot be liable for their doings.

Prisons: Public places of detention: Public laws. All criminal prisons are and must be public and not private places of detention, and no imprisonment can be lawful that is not authorized by public laws.

Submitted on briefs June 15. Decided October 4.

Error to Wayne Circuit.

DETROIT V. LAUGHNA.

D. C. Holbrook, for plaintiff in error, cited: *Fisher v. Boston*, 10 Mass., 57; *Hafford v. New Bedford*, 16 Gray, 297; *Jewett v. New Haven*, 38 Conn., 368; *Walcott v. Inhab. of Swampscott*, 1 Allen, 101; *Buttrick v. Lowell*, 1 Allen, 172; *Small v. Danville*, 51 Me., 359; *Wharton on Negligence*, § 191; *Shearman & Redfield on Negligence*, 163-6.

B. T. Prentis, for defendant in error, cited: *Johnson v. Municipality*, 5 La. An., 100; *Highway Comrs. v. Martin*, 4 Mich., 557; *Detroit v. Corey*, 9 Mich., 165; *Bailey v. Mayor of N. Y.*, 3 Hill, 531; *Detroit v. Blackeby*, 21 Mich., 84; *Barton v. Syracuse*, 36 N. Y., 54; *West v. Brockport*, 16 N. Y., 161; *Henley v. Mayor, etc.*, 5 Bing., 91; *Mayor of Lynn v. Turner, Cowp.*, 86; *Rochester W. L. Co. v. Rochester*, 3 N. Y., 463; *Hulson v. Mayor*, 9 N. Y., 163; *Sheldon v. Kalamazoo*, 24 Mich., 383; *Park Comrs. v. Com. Council*, 28 Mich., 228; *Oliver v. Worcester*, 102 Mass., 449; *Eastman v. Meredith*, 36 N. H., 295; *Lloyd v. Mayor*, 5 N. Y., 369.

CAMPBELL, J.:

Laughna recovered a judgment against the city of Detroit for personal injuries which resulted from his being compelled by the officers of the House of Correction to take a cold bath under improper conditions and subsequent improper exposure in a cold cell. It is to be presumed that his treatment was such as to deserve condemnation, inasmuch as he was awarded substantial damages. The case is brought into this court to determine whether the city is responsible for the misconduct of the prison officers.

We have not been able to discover any principle on which that liability can be maintained. The city, indeed, built the prison, and has an interest in its finances, as it is responsible to a certain degree for its expenses; but after the

DETROIT V. LAUGHNA.

house was built under provisions of the city charter, which may or may not have been legally sufficient to provide for its future management, the legislature, either discovering defects, or, more probably, recognizing the manifest impropriety of allowing a prison to be managed by a city council, passed a statute which removed any doubt concerning the legal position of that establishment. On the 15th of March, 1861, an act was passed entitled "An act to establish the Detroit House of Correction and authorize the confinement of convicted persons therein."

By this act the government of the prison was put under the control of a board of inspectors, of whom three were to be appointed by the common council, on the nomination of the mayor, and in addition to these, the mayor and the chairman of the board of state prison inspectors were made *ex officio* members. The regulation and discipline were to be under rules adopted by the board, leaving the council no voice except concerning the approval of rules relating to salaries and compensation of officers and employés. There is no very important power which the council can exercise without the concurrence of the inspectors, except in the selection of the superintendent, whose powers and duties are all governed by the act of 1861 and the general laws of the state. Any interference whatever by the common council, either in the selection of inferior officers or in the internal management of the prison, would be unlawful and nugatory.

While it has at various times in legal experience been customary to allow and sometimes to compel prisons to be built and maintained by larger or smaller municipal corporations, yet all criminal prisons are and must be public and not private places of detention, and no imprisonment can be lawful that is not authorized by public laws. In England it is settled that all prisons, by whomsoever kept, are the king's prisons (2 *Inst.*, 100, 589; *Ex parte Evans*, 8 *T. R.*, 172), and no new prison can be erected except by act of parliament.—2 *Inst.* 705.

The whole subject of personal liberty is one of general

DETROIT V. LAUGHNA.

state concern, and imprisonment in all its incidents has always been regulated by statute. The law of 1861, adopting the house of correction as a public prison, has provided for a state representative on the governing board, and has provided expressly, and has not left to the action of the common council to determine, under whose control its regulation shall be placed.

It is impossible under such a law to regard the city of Detroit either as custodian of the prison or as jailer and guardian of the prisoners. The officers are not city agents, and the city has nothing to do with their responsibility. It has no means of directing or of checking their action under the law, and the liability to respond for their misconduct cannot be laid upon the municipality, between whom and them there is no relation of agency or service.—*Yorke v. Chapman*, 11 Ad. & El., 813.

The declaration shows no cause of action, inasmuch as judicial notice must be taken of the statute. The judgment must be reversed, with costs of both courts. No new trial would be proper, as the record shows no liability.

The other Justices concurred.

Gilbert Dale v. James M. Turner and another.

Swamp lands: Statutes construed: Purchaser from the United States: Intervening rights. Under the act of congress of September 23, 1850, granting to the state of Michigan certain lands known as "swamp lands," and the subsequent acts of March 2, 1855, and March 3, 1857, and the statutes of Michigan of June 23, 1851, of February 14, 1853, and March 11, 1861, it is held that the rights of one who had purchased of the United States authorities in 1852, and gone into possession of a parcel of land embraced in the scheme of the original act of 1850, were paramount to those of the state under said grant, or of its assigns.

DALE V. TURNER.

Legislation construed. The intent is plain from this legislation, both on the part of the United States and of the state, to make this donation to the state, as contemplated in the original grant, subject to all intervening rights of parties who had, before the complete vesting of the title in the state, purchased from the United States.

Swamp land acts: Donation to state: Intervening rights: Sales by United States. Whether or not the original act was sufficient of itself to work an immediate transfer of title to the class of lands to which it applied, it was clearly within the power of the contracting parties, the state and the United States, to agree, in the absence of any conflicting right, that sales made by the latter subsequent to such act should be respected by the state and be left to be completed by the United States by conveyance, and that the state should resort to the United States for equivalents; and their action clearly indicates that they did make such agreement.

Bills to quiet title. Under the statute (*Comp. L. 1871, § 5072*) providing for filing bills to quiet title to lands, a complainant, whose grantors had purchased of the United States in 1852 a parcel of said swamp land, and who is in actual possession thereof, may come into equity for protection against the claims of a defendant under a subsequent patent from the state, who has never been in possession.

Estoppel in pais: Equity pleading: Answer. A defense based upon an estoppel *in pais* cannot be sustained unless it be pleaded; and an averment, in an answer to a bill to quiet title and to restrain an ejectment, that one alleged to be complainant's solicitor urged the bringing of the ejectment, and represented that complainant was aware he had no title and was desirous of having an ejectment prosecuted to judgment to enable him to have recourse against his warrantor, but which is not pleaded as matter of estoppel, is insufficient, if established, to make out a valid defense of estoppel.

Heard June 20. Decided October 4.

Appeal in Chancery from Eaton Circuit.

I. H. Corbin, John M. Corbin, E. A. Foote and P. T. Van Zile, for complainant, to the point that complainant's title was such only as the locator, Britton, acquired by his entry and location, and this was an equitable title, cited: 4 Wall., 210; 11 Wheat., 200; 3 How., 441; as to complainant's right to come into equity for relief: *Comp. L., 1871, § 5072; 1 Doug., 546; 9 Mich., 381; 16 Mich., 135; 13 Peters, 436; 11 Wheat., 380.*

This case is not within the ruling of *Grant v. Smith*, 26 Mich., 204, or *Busch v. Donohue*, 31 Mich., 481; or *R. R. Co. v. Smith*, 9 Wall., 95; the swamp land grant of 1850 is to be construed as only an agreement

DALE v. TURNER.

to convey: 5 *Wend.*, 26; and the state, by the action of its legislature in 1853, waived its claims as against intervening purchasers from the United States; a grant by congress should have operation according to its intent: 20 *Mich.*, 304; as to construction of government grants: 11 *Peters*, 589; 15 *Ib.*, 215; 16 *Ib.*, 411; 1 *Black*, 377; 24 *Ark.*, 440; 17 *How.*, 558; that this was not a grant *in presenti*: 63 *Ill.*, 359; 66 *Ib.*, 450; 67 *Ib.*, 281.

The equitable title of the locator, confirmed by congress, is the highest evidence of title: 2 *How.*, 319.

A defendant can only defend on the grounds set up in his answer: 2 *Mich.*, 144, 161; *Walk. Ch.*, 267; facts proved but not put in issue by the pleadings cannot be regarded at the hearing: 2 *Mich.*, 381; 6 *Ib.*, 133; 8 *Ib.*, 395; 9 *Ib.*, 213; 10 *Ib.*, 453; 11 *Ib.*, 284, 529; 16 *Ib.*, 223; and therefore the defense of estoppel cannot avail in this case.

Crane & Montgomery, for defendants, relied mainly upon *Busch v. Donohue*, 31 *Mich.*, 481. They argued that no state court could make a decree in a collateral proceeding declaring that the government exceeded its powers in issuing a patent, or invalidating or setting aside such patent, or holding the government equitably estopped by a transaction of one of its agents from patenting its lands: *Bruckner v. Lawrence*, 1 *Doug.*, 37; *Bruner v. Manlove*, 1 *Scam.*, 161; *Jackson v. Ingraham*, 4 *Johns.*, 181; *Mansey v. Drake*, 10 *Johns.*, 23; 2 *Wash. R. P.*, 524, § 24; *Jackson v. Hart*, 12 *Johns.*, 81; *Boggs v. Mercer Mining Co.*, 14 *Cal.*, 361; *Field v. Seaburg*, 19 *How.*, 333; that the grant of 1850 was a grant *in presenti* and the title then passed to the state, so that the lands were no longer subject to private entry: 31 *Mich.*, 481; *R. R. Co. v. Fremont Co.*, 9 *Wall.*, 89; 2 *Wash. R. P.*, 525, 526, §§ 26-30; *R. R. Co. v. Smith*, 9 *Wall.*, 95; *Johnson v. Ballou*, 28

DALE V. TURNER.

Mich., 383; 24 *Ark.*, 437; that if the patent were necessary to transfer the title, it took effect by the doctrine of relation from the time when the state became entitled: 13 *Wall.*, 100; that if it were necessary to make the grant definite and certain in its application to particular parcels, this was accomplished by the designation on the maps of survey, and the subsequent acceptance by the legislature; and the act of 1850 was as effectual to transfer the title as a patent: *Enfield v. Perruit*, 8 *N. H.*, 512; *Enfield v. Day*, 11 *N. H.*, 520.

GRAVES, J:

This cause comes before the court by appeal on complainant's part from a decree dismissing his bill on pleadings and proofs.

The parties holding hostile claims to two forty-acre parcels of swamp land, and complainant being in possession, the defendants brought ejectment, and thereupon complainant filed the present bill to enjoin the law proceedings and to subject the question of right underlying the controversy to decision in equity.

The complainant claims through several mesne grants from one Britton, who in 1852 made an entry at the United States land office at Ionia under a military bounty warrant, and received from the office a certificate of purchase in the usual way. And the defendants claim as purchasers from the state under its patent regularly issued to them in 1873.

The facts connected with the final question do not appear to be disputed, and of course the acts of congress and of the legislature are recognized by the court.

On the 28th of September, 1850, congress passed the act commonly known as the "swamp land act," and thereby granted for the purposes specified the swamp and overflowed lands, "made unfit thereby for cultivation." The act required the secretary of the interior, as soon as practi-

DALE V. TURNER.

cable, to make out an accurate list of the plats of such lands and transmit the same to the governor, and on request of that officer to cause a patent to be issued to the state therefor; and it declared that on that patent the fee simple to said lands should vest in the state subject to the disposal of the legislature. Prior to the transmission of any lists to the governor by the secretary, and nine months after the passage of the act of congress, namely, on the 28th of June 1851, the legislature passed the act entitled, "An act to provide for the sale and reclaiming of swamp lands granted to the state, and for the disposition of the proceeds," and the first section declared that the legislature adopted "the notes of the surveys on file in the surveyor general's office, as the basis upon which they will receive the swamp lands granted," etc.

The third section declared that "the commissioner of the state land office shall have the control and supervision of said lands, and of the sale thereof, and shall, as soon as the title vests in the state, cause the same to be sold," etc.; and the sixth section declared that "said lands shall only be sold in the same legal subdivisions in which they shall be received by the state."—*L. 1851, p. 322.*

The lands in question belonged to the class of lands described in the act of congress, and were designated as swamp or overflowed lands on the official plats of the United States survey.

Subsequent to this act of the legislature, but prior to any further proceedings by authorities at Washington, and on the 17th of March, 1852, Britton entered the land at the United States land office at Ionia, by means of a military land warrant, and the officers there regularly recognized him as purchaser, and gave him a certificate of purchase in due form and according to the practice of the office.

Possession was at once taken by Britton as purchaser, and it has remained since in those holding his right, of whom complainant is the last. Sometime after his purchase, but at what precise time does not appear, except that it was

DALE v. TURNER.

prior to sale by the state to defendants, the land warrant and an application for a patent to Britton were filed in the general land office at Washington, and have since remained there.

We have the most conclusive evidence from departmental and judicial records that between the passage of the swamp land act and the formal identification of the parcels appropriated and the practical transfer of their administration to state authority, the cases in this and other states of purchase of the United States, or of entry under their laws by private parties, were very numerous, and we also know that the existence of this state of things was matter of common notoriety at the time; moreover, during the period in question, there was grave difference of opinion as to whether the act of congress of its own force worked an instantaneous transfer, or merely devoted the lands to eventual transfer, and contemplated that they should be catalogued by the secretary of the interior, and perhaps patented in order to consummate conveyance. Many able men were of the latter opinion, and our own legislature appears to have taken this view in framing the act of June 28, 1851, and to have continued it for some time afterwards. The phraseology of the act of 1851, and of some other acts can hardly be accounted for on any other theory.

Seeing that the purpose of congress was to make a donation, and not a conveyance for consideration, and believing that the act did not of its own force immediately transfer the lands in absolute property to the state, and naturally wishing to act in the same spirit of liberality which had actuated the general government, the legislature were of opinion that measures should be taken to protect the rights of intervening purchasers from the United States, and enable the state and the United States to settle in an amicable, fair and practical way as between themselves in all cases where the rights of such purchasers might be involved. The very nature of the subject, and all the circumstances, were adapted to incline the legislature to act on broad views of

DALE v. TURNER.

right and policy, and to abstain from all extreme pretensions and all attempts to gain technical advantage. In its origin and development the matter was not one of negotiation and diplomacy, nor one stimulated or directed by national or personal greed. The occasion was not one of higgling between eager and exacting adversaries. It was an affair between governments of the same system, intimately connected by the ties of interest and of friendship. The lands were to be a gift. Moreover, the purchasers in question were likely to be inhabitants of the state, and their interests might naturally be thought to merit on that account a particular solicitude by the legislature. As we have seen, Britton, the complainant's predecessor in right, was one of these purchasers. These considerations naturally conduct us to the act of the legislature of February 14, 1853. It was entitled, "An act to authorize the state treasurer to receive from the general government certain moneys arising from the sale of swamp lands, and to authorize the commissioner of the state land office to take an assignment of all warrants received for any of the swamp lands sold in this state since the act of congress approved September twenty-eighth, eighteen hundred and fifty."

The act expressly authorized the state treasurer to receive from the general government any moneys which had then been received, or might thereafter be received for any of the swamp lands "donated" to the state, and also expressly authorized the commissioner of the state land office to take assignments of all bounty land warrants *received* for any swamp lands sold in the state subsequent to the passage of the act of congress, and to release the interest of the state in any lands sold or entered with said warrants to purchasers or their assigns. The act also made provision for protecting the rights of those who were actual pre-emptioners under federal laws when the swamp land act was passed. —*L. 1853, p. 116.*

Some months later, and on the 27th of October, 1853, the commissioner of the general land office at Washington

DALE v. TURNER.

prepared lists of the Michigan swamp lands, and no doubt he conformed in making them to the "basis" suggested in the act of this state of June 28, 1851, and followed the notes of the surveys on file in the surveyor general's office. These lists, one of which contained the lands in question, the commissioner submitted to the secretary of the interior, the officer designated by the swamp land act to make and transmit the lists, and he at once certified them as follows: "The lands embraced in the following lists are hereby approved to the state of Michigan under the act of congress approved 28th September, 1850, subject to any valid legal claim that may exist thereto."

This proceeding was nothing more than the execution of a departmental schedule, upon the "basis" before mentioned, to supplement the original act and identify according to the notes in the surveyor general's office, the parcels to be considered as swamp lands within the terms of the act of donation. It was not intended to operate and was not of force to operate so as to extinguish or defeat rights which individuals had previously acquired by purchase of specific parcels of the United States and payment of cash or warrants therefor, and which rights, moreover, the state by legislative act had solemnly announced in effect it would not disturb.

Whether particular parcels after the 28th of September, 1850, had not been so dealt with between third parties and federal land officers as to make it just to except such parcels or expressly stipulate for the protection of such third parties, was not a matter within the scope of the proceeding, or one the secretary had power to settle. In merely applying the general act to the particular parcels which its general terms called for, no such matters were touched at all. They were necessarily left to other regulations. The secretary, however, took the precaution to include in his certificate of approval of the descriptions a declaration that it was made and to be received "subject to any valid legal claim that may exist thereto."

DALE v. TURNER.

The act of 1853 continuing in force as the expression of the legislature of Michigan that the rights of intermediate purchasers from the United States should be respected, and that the state would have recourse to the United States for any indemnity which might be proper, and many controversies arising in this and other states on account of such purchases, and the land department at Washington being greatly embarrassed thereby, the attention of congress was strongly attracted to the subject, and with a view to settle upon some practical basis for the fair adjustment of all difficulties, the act of March 2, 1855, was passed.—*10 U. S. Stat. at Large, 634.*

It was entitled "An act for the relief of purchasers and locators of swamp and overflowed lands." It contained but two sections, and the first enacted that as soon as practicable the president should cause patents to be issued to the purchasers or locators who had entered public lands, claimed as swamp lands, either with cash or with land warrants or scrip, prior to the issue of patents to the states as provided by the second section of the swamp land act, any decision of the secretary of the interior or other officer of the government to the contrary notwithstanding; except that in cases of sales by the states before entry under the laws of the United States no patent should be issued until the state should release; but yet if the state omitted for the space of ninety days to forward lists of the lands so sold, that then patents should issue as before ordered without delay.

The second section provided for indemnity to the state by ordering that the purchase price in case of cash sales by the United States, should be paid over to the state, and in case of sales for warrants or scrip that the state should have other lands to be selected by it from any of the public lands subject to entry and for which it should receive patents.

However this enactment may have agreed or disagreed with legislation elsewhere, it imported both in spirit and sub-

DALE V. TURNER.

stance that congress acceded to the course indicated and held out by our act of 1853.

It embraced the same idea that the purchases from the United States should stand and be carried out by the latter, and that the state should be indemnified. Subsequently, and on the 26th of February, 1857, a patent to the state was issued out of the department at Washington for the lands covered by the general terms of the act of 1850, and it embraced the descriptions of the lands in question. In drawing up this patent there was no attempt to discriminate and exclude the parcels within the purview of the acts of 1853 and 1855.

The patent simply assumed to follow the selections which had been previously made as answerable to the general call of the act of 1850. This is indicated by several incidents and is made very apparent by the recital in the patent. There was neither any design nor any power to include in the act of patenting a departure from the legislative regulations concerning exceptional cases.

They were to remain subject to those specific provisions and stipulations which congress and the legislature had decided to be appropriate. It is not necessary to resort to general reasoning to show this. It appears sufficiently from the state of things and later proceedings. Within a week after the patent issued, namely, on the 3d of March, 1857, congress very explicitly manifested its sense on the subject. It passed an act to confirm to the several states the swamp and overflowed lands selected under the act of 1850, and under an act of the previous year, and enacted that the selection of swamp and overflowed lands previously made and reported to the general land office, and remaining vacant and unappropriated, and not interfered with by actual settlement under any existing law of the United States, was thereby confirmed, and should be approved and patented as soon as practicable conformably to the original act. But it was at the same time expressly declared that nothing in the

DALE V. TURNER.

act should interfere with the provisions of the act of 1855, and that such provisions should continue in force and extend to all entries and locations of lands claimed as swamp lands made since its passage.—*11 U. S. Stat. at Large, 251*. Nothing can be clearer than this evidence of the will of congress that such purchases as that of Britton should still stand guarded and be considered as protected by the act of 1855, and be wholly unprejudiced by any decision of United States officers in the giving out of a patent to the state or otherwise. On the other hand, the state legislature not only retained the act of 1853, but on the 11th of March, 1861, proceeded to enact that the commissioner of the state land office should cause lands sufficient to supply the existing deficiency in the quantity accruing to the state by virtue of the act of congress of May 20, 1826, the ordinance of admission and any other land grant since made to the state by act of congress, to be selected and located in parcels in conformity with the provisions of the several acts making the same.—*L. 1861, p. 167*. This act supplemented that of 1853, and supplied an express and specific direction for working out equivalents in land, as contemplated by the act of congress of 1855.

The act of 1853, in providing that swamp lands purchased with warrants should be released, and that the commissioner of the state land office should take assignments of the warrants, may have contemplated that other lands might be selected; but if it did so, it was quite proper to make the matter distinct and certain.

It is considered clear that notwithstanding the emanation of the patent, all transactions like that in question were meant to be left, and were left, to the control of the exceptional regulations marked out by the acts of 1853 and 1855. After the patent to the state, and on the 7th of October, 1859, the commissioner of the general land office at Washington notified the governor of the issue to Britton before the patent, of the certificate of purchase upon the warrant, and asked the governor to execute a release to the United

DALE v. TURNER.

States, so that the land might be patented pursuant to the purchase. This, however, was never done, and finally, and on the 17th of February, 1873, the land was sold and patented by the state authorities to the defendants for one hundred dollars.

This somewhat tedious explanation not only shows the complexion of the controversy between the parties, but also leads at once to an opinion upon the question of right.

There is no occasion to assail the position that the swamp land act was sufficient to work an immediate transfer of the class of lands to which it was applicable. Because, if it was so, it was still within the power of the state and the United States, the parties to the grant, to agree, in the absence of any conflicting right, that sales made by the United States subsequent to the swamp land act should be respected by the state and be left to be completed by the United States by conveyance, and that the state should resort to the United States for equivalents, and it is upon this very ground the complainant's right may rest.

In the act of 1853 the legislature distinctly recognized such sales as that which had been made to Britton as transactions to be respected and guarded and to be left for the United States to consummate by conveyance, and at the same time and in the same connection held out that the state would have recourse to the United States for indemnity and in substance made overtures for it; and congress, by the act of 1855, in effect assented to the scheme suggested by the act of 1853, and made provision for patenting to purchasers and for equivalents to the state; and if there was any uncertainty before in regard to the receipt and selection of other lands by the state in place of parcels entered on warrants, it was entirely removed by the state act of 1861.

These enactments then constituted an arrangement in the nature of a compact or special bargain that such sales as that to Britton should not be invalidated by the operation of the swamp land act, but should be left to be carried

DALE V. TURNER.

out by the United States as though such act were not applicable, and that the state should look to the United States for indemnity for parcels of swamp lands thus disposed of.

Such being the case, the lands in question were lawfully taken out of the category of swamp lands controllable by the legislature, and were not vendible by state authority in 1873, when defendants purchased and received their patent.

Under these circumstances, may complainant come into equity to assert his right and obtain protection against the hostile claim of the defendants?

If this inquiry depended on the scope of the routine jurisdiction of the court, the determination to be made upon it might require special consideration.

But the statute (§ 5072, *C. L.*) appears to exclude all questions and to require an affirmative answer.

The case establishes these propositions:

First, That complainant holds a complete equitable title, and which antedates the origin of any claim by defendants.

Second, That actual possession under such title is in him, and was so when defendant's claim arose, and has so remained.

Third, That prior to this suit, and at its commencement, the defendants set up a claim to the land in opposition to the title claimed by complainant. Complainant's cause would therefore seem to be strictly within the statute. See *Stark v. Starrs*, 6 Wall., 402; *Meador v. Norton*, 11 Wall., 442.

It was objected on the argument that even if complainant's right should be found complete, still there were special circumstances which were sufficient to estop him from maintaining it in this court. This is sufficiently answered by saying that no such defense is pleaded. It is true that in answering the statement in the bill setting up the institution of the ejectment suit the defendants state certain facts in explanation of the commencement of that suit and to the effect that a gentleman alleged to be complainant's solicitor urged the bringing of it, and represented that complainant

DALE v. TURNER.

was aware he had no title and was desirous that an ejectment should be prosecuted to judgment to enable him to have recourse against his warrantor.

These facts were not pleaded as a ground for claiming that complainant was estopped thereby from prosecuting his bill, and they were not sufficient if they had been. Indeed, the answer made no reference to such a position, and the objection is not now rested upon these matters alone, but upon these and other distinct and important matters given in evidence, but without any basis for them in the answer. But if this defense had been advanced in pleading, the court is far from satisfied it could have prevailed. The point, however, is not in the case, and is consequently not decided.

The decree below must be reversed, with costs of both courts, and one entered perpetually enjoining the ejectment suit and requiring the defendants to release to complainant all claim to the lands depending on the state patent, this decree standing in the meantime in place of such release.

The other Justices concurred.

Samuel G. Leland and others v. Peter H. Collver
and others.

Chattel mortgages: Goods subsequently acquired. A chattel mortgage of a stock of goods, giving the mortgagor authority to sell at retail in the ordinary course, and which required him to keep up his stock of like goods to a specified amount as security to the mortgagee, and to keep the stock insured for his benefit, and was worded to cover, in addition to the goods therein specifically described, all the stock the mortgagor should have from time to time in trade, is held valid, in the absence of any intervening paramount rights of third persons, to authorize the mortgagee to seize and subject to sale goods purchased and added to the stock subsequent to the giving of the mortgage.

Contracts: Trusts in personal property: Continuing fund. It is competent for parties to make contracts of agency, bailment, or other authority, as broadly as they choose, where no legal policy and no paramount right

LELAND v. COLLVER.

intervenes before their enforcement; and trusts in personal property, where the specific property is constantly changing while the fund remains subject to the duties and burdens of the trust, are not uncommon.

Trusts: Transfers subject to the trust: Purchaser becomes trustee. This trust or power attaches with like force to the property in the hands of purchasers thereof from the mortgagor subject to the terms and conditions of the trust agreement, as well as to additions made by them to the stock, as it would as between the original parties; every such purchaser becomes in equity a trustee of the fund.

Mortgages: Double covenant: Breach of either: Defeasance: Right of foreclosure. Where in such a mortgage the covenants to keep up the stock and to insure are united, and it is provided that "a breach of these two covenants shall cause the whole sum secured to become due and payable," but the defeasance expressly authorizes a foreclosure on a breach of either, it is held, construing the mortgage as a whole, that a double breach is not essential to the right to foreclosure.

Chattel mortgages: Sales: Consent: Condition: Forfeiture: Waiver. A ruling that a waiver of the condition, that a sale except at retail without written consent would operate as forfeiture, could not be found unless the jury should find the property was sold with the knowledge and consent of the mortgagees, is held not to be an error of which parties standing in the place of the mortgagor can complain.

Mortgages: Covenant to insure: Breach: Insurance by mortgagee. Where there is a covenant to insure in a mortgage, and it is not kept, the mortgagee may very properly insure, and he can add the premium to his debt, if fair and reasonable.

Husband and wife: Business conducted by husband in the wife's name: Statements: Notice. Where business is conducted entirely by the husband, but in the name of the wife, the latter will be bound by the statements and conduct of the husband in the course of the business, and notice to the husband is notice to the wife.

Submitted on briefs June 20. Decided October 4.

Error to St. Joseph Circuit.

David Knox, Jr. and Upson & Thompson, for plaintiffs in error, to the point that a chattel mortgage, so far as it attempts to subject after-purchased property of the mortgagor, or his assigns, to its operation, is void and creates no lien on such property and gives no authority to the mortgagee to seize and sell the same, and that a mortgage, like a sale, requires a subject *in esse* and in the power of the mortgagor, cited: *2 Hill on Mort.*, 337, §§ 16-24; *Jones v. Richardson*, 10 Met., 481; *Edgell v. Hart*, 9 N. Y., 217; *Mogg v. Baker*, 3 M. & W., 195; *Gale v. Burnell*, 7 A. & E. (N. S.), 850; *Single v. Phelps*, 20 Wis., 419; *Tucker v. Alger*, 30 Mich., 67; *Gay v. Bidwell*, 7 Mich., 521; that a mortgage of the

LELAND V. COLLVER.

whole of the mortgagor's stock now in his possession, and also such additions thereto as he may thereafter make from time to time, conveys only the stock on hand at the date of the mortgage: *Wagner v. Watts*, 2 *Cranch C. C.*, 169; *In re Kahley*, 2 *Biss.*, 383; *Winslow v. Merchants' Ins. Co.*, 4 *Met.*, 306; *Moody v. Wright*, 13 *Met.*, 17; *Barnard v. Eaton*, 2 *Cush.*, 303; *Gardner v. McEwen*, 19 *N. Y.*, 123; *Lunn v. Thornton*, 1 *M. G. & S.*, 379; *Mowry v. White*, 21 *Wis.*, 417; that the mortgage in question was void for uncertainty: *Collins v. Myers*, 16 *Ohio*, 547; *Gay v. Bidwell*, 7 *Mich.*, 522; *Blakely v. Patrick*, 67 *N. C.*, 40; *Matter of Manly*, 2 *Bond*, 261; that a stipulation that subsequently acquired property should be subject to the same lien would be an executory agreement only, and would not bind after-acquired property until actually executed by a new mortgage given after its purchase: *Codman v. Freeman*, 3 *Cush.*, 309; *Jones v. Richardson*, 10 *Met.*, 481; that the statements of Moore should not have been received in evidence as binding his wife: *People v. Olmstead*, 30 *Mich.*, 435; *Horner v. Fellows*, 1 *Doug.*, 51; *Converse v. Blumerich*, 14 *Mich.*, 109; *Thomas v. Harding*, 8 *Greenl.*, 417; *Anderson v. Rome, etc., R. R. Co.*, 54 *N. Y.*, 334; that the admission in evidence of the contracts of mesne purchasers from the mortgagor, whereby they assumed and agreed to pay the mortgage, was erroneous; since they only created a personal liability, and not a lien on the property, and especially not a new and independent lien on the stock of any new contracting party as to additions made by him or his assigns: *Moody v. Wright*, 13 *Met.*, 32; *Codman v. Freeman*, 3 *Cush.*, 306; *Otis v. Sill*, 8 *Barb.*, 102; *Rhine v. Phelps*, 3 *Gilm.*, 455; *Gale v. Burnell*, *ubi supra*.

R. R. Pealer and *H. H. Riley*, for defendants in error, as to the validity of the mortgage to authorize the seizure and sale of after-acquired goods, no paramount rights

LELAND V. COLLVER.

intervening, cited: 7 *Mich.*, 519; 2 *Cush.*, 294; 3 *Met.*, 518; 11 *Ib.*, 333; 20 *Me.*, 408; 40 *Ib.*, 561; 42 *Ib.*, 132; 20 *Ia.*, 399; *Alb. L. J.*, May 20, 1876, p. 341; *Cent. L. J.*, May 5, 1876, p. 286; that a person buying subject to a mortgage is in no position to dispute its validity: *Webb v. Mann*, 3 *Mich.*, 142; that the mortgage contained no illegal provision, not reconcilable with an honest intent, and was therefore not void on its face: 7 *Mich.*, 108; and was operative, as between the parties, to convey the property subsequently acquired: 7 *Mich.*, 522; and that under the condition the goods could be sold before the mortgage became due: 29 *Barb.*, 518; 6 *Abb. N. Y. Dig.*; that the plaintiffs, taking subject to and with notice of the mortgage, have no greater rights than the mortgagor: 2 *Story*, 630; 2 *Johns.*, 229.

CAMPBELL, J:

Plaintiffs in error sued defendants in error in trover for the conversion of certain furniture which had been the stock in trade of plaintiffs. Defendants justified under a chattel mortgage, the terms of which are important as presenting most of the questions in controversy.

This mortgage, dated July 3, 1870, was made by Emanuel Shnyder to defendants Illenden & Collver to secure two thousand dollars and interest at ten per cent. annually, one thousand in two years and one thousand in three years from date. It was given for the purchase money of the stock of goods mentioned in it. The property mortgaged was set forth in these terms, with the conditions appended:

"All the goods, wares, and merchandise, chattels and effects mentioned and described in the schedule hereto annexed and marked 'Schedule A,' this day bought of Illenden & Collver, thereby intending to convey all the present stock in trade as enumerated in said schedule; also all the stock I may have from time to time in trade as security

LELAND V. COLLYER.

for the above named consideration, said goods to remain and continue in the possession of the party of the first part, in the village of Three Rivers, Michigan, except as they are disposed of in the usual course of retail trade; the party of the first part is to have the privilege of selling the goods for cash or on credit in the usual course of trade, and is to apply the proceeds of the sales in buying other goods to keep up the stock and to the support of his family. The party of the first part covenants to keep up a stock of like goods to the value of three thousand dollars as security to the parties of the second part until the above amount, with interest, is paid, and also covenants to keep the stock insured to the amount of two thousand dollars for the benefit of the party of the second part and as collateral thereto, and a breach of the last two covenants shall cause the whole sum secured to become due and payable."

In addition to the usual conditions of defeasance, the mortgage contained the following as among the acts which would authorize a seizure and sale: "If the said party of the first part shall sell, assign or dispose of, or attempt to sell, assign, or dispose of the said goods and chattels contrary to the terms of these presents, or remove or attempt to remove the whole or any part thereof from the said village of Three Rivers without the written assent of the party of the second part, or if the insurance is not kept up, or if the stock is sold below the amount covenanted to be kept up, then and from thenceforth it shall and may be lawful for the said party of the second part," etc., to enter, etc.

The undisputed facts are that Shnyder, after making this mortgage, continued in business alone, and in partnership with others, until August 30, 1871, when he sold out his interest in the firm of Shnyder & Bellows to one John Koahn, who in a short time bought out Bellows also, and continued in business alone until on the 11th of November, 1871, he sold out his stock to the plaintiff Nancy Moore, giving an inventory which was declared to be "subject to a

LELAND v. COLLVER.

chattel mortgage." There was no other chattel mortgage than the one in question. The other plaintiffs became partners with Nancy Moore, and during their continuance in business they added three hundred and forty-four dollars worth of goods purchased from other parties, and sold about one thousand five hundred dollars worth at retail. Illenden and Collver seized the stock under their chattel mortgage on the 22d of February, 1872, and sold it. The property sold included some recent purchases and unfinished articles. But a small part of the property was in that originally sold by Illenden & Collver to Shnyder. Alfred B. Moore, husband of Nancy Moore, acted for her in making her original purchase, and in superintending all her business, in which she did not act personally for herself at all.

All the persons who became interested in the stock of goods took with notice of the chattel mortgage, and bought subject to it.

The principal question, which is presented under many forms, is, whether Illenden & Collver had a right under the chattel mortgage to seize and sell the property not originally in their possession and within their sale to Shnyder, for the purchase price whereof the security was given.

It is not insisted by defendants in error as matter of law that the mortgage became operative as a present conveyance upon each successive addition to the stock in trade as soon as purchased. The claim, as we understand it, is, that it gave the mortgagees authority to seize and subject such property to sale, and to make good title under such power, unless prevented by the paramount right of some person intervening with a valid claim or title created prior to such seizure.

Some question appears to have arisen concerning the effect of a confusion of goods by intermixture. It would be difficult to create such a confusion among such articles as those in controversy, and it does not appear in fact that any serious difficulty was found in distinguishing the property.

LELAND v. COLLVER.

The questions, in our judgment, need not be considered in that point of view. But as the legal propositions themselves are somewhat intermingled, they can be more satisfactorily disposed of together than separately.

It was held in *Holmes v. Hall*, 8 Mich. R., 66, that an agreement whereby a creditor was authorized in a future contingency to take possession of a stock of goods and sell them, but which contained no terms of transfer or hypothecation, was not a mortgage, but was only a beneficial power, which could not fix any rights in the property before seizure. A similar doctrine was held in *Dallon v. Laudahn*, 27 Mich. R., 529, where the power was contained in a lease. But it was further held in the latter case that the agreement was valid and operative according to its terms, and no good reason occurs to us, and we think there is no satisfactory authority why it should not be. Parties can, if they choose, make contracts of agency, bailment, or other authority, as broadly as they choose, where no legal policy and no paramount right intervenes before their enforcement. And if those agreements contain a license or permission to take possession and sell, no court can deny the validity of the possession and sale, if the parties are capable of contracting and no other rights intervene.

Cases are not rare in which tenants of lands have been compelled to perform their stipulations to leave certain live stock or other property on the estate at the end of their leases. And trusts in personal property are of every day occurrence, in which the specific property is constantly changing, while the fund remains subject to the duties and burdens of the trust. Partnership operations are notable instances of this kind.

The present mortgage is one where the parties both agreed that the primary fund should be kept good by successive sales and re-investments, which it is evident was necessary, in the first place to enable Shnyder to pay for his goods, and in the second place to make Illenden & Collver secure by replacing what had been sold. The agreement was fair and

LELAND V. COLLVER.

intelligible, and it is as easy to identify this fund as any other which changes its shape but not its legal identity by re-investment.

If the mortgage had not authorized sales, and the property had been sold notwithstanding, a court of equity would find no difficulty in pursuing the trust fund, so long as it could be identified, into the property wherein it had become re-invested, and it pursues this course because the new property is regarded as belonging to the trust as effectually as the old. And this pursuit of trust funds is not confined in all cases to the possession of the original wrong-doer. Persons taking with notice are in the same position in a large class of cases.

In the present case the parties have seen fit to stipulate expressly that the body of the fund may be changed without losing its identity, and that the mortgagee may deal with it as if unchanged. The various purchasers have made their purchases subject to this arrangement, and are estopped from denying it. The mortgagees in taking the property did only what Shnyder agreed they might do, and what the several purchasers also understood they were authorized to do.

A purchase of property subject to such a power would certainly be regarded in equity as liable to be subjected to a disposition in furtherance of the trust. Every one taking it on those terms becomes in equity a trustee of the fund. And where the contract itself points out the way for the enforcement of rights by act of the party, and he has only done what it was agreed he might do, it would be unjust and absurd to hold him responsible as a wrong-doer, as against those who were bound by the terms of their own holdings to allow him to do it.

If the additions to the stock made by the later purchasers had exceeded in value the amount of sales from the stock, there might possibly be some difficulties which do not exist here. But the sales largely exceed the additions.

For any sale beyond such articles as raised the amount

LELAND V. COLLVER.

of the mortgage with interest and expenses, the mortgagees were liable. But this the court distinctly charged, and we find nothing to indicate that this point was not fairly placed before the jury. They were expressly told that the sale of a single article after the requisite sum had been raised would be unauthorized.

Some questions were raised concerning the right to foreclose before the maturity of the mortgage. It is claimed that under the terms of the mortgage it did not all become due on the failure to insure alone, or on the reduction of the stock alone below three thousand dollars. This, we think, is not so. It is true that in the early part of the mortgage the covenants to insure and to keep up stock are united, and it is said "a breach of the last two covenants shall cause the whole sum secured to become due and payable." Assuming what we very much doubt, that this by itself technically requires a double breach, yet it must be read with the rest of the mortgage. In the proviso or defeasance, where it is proper to look for the careful statement of the mortgagee's rights, there is no ambiguity. The remedy is expressly given on a breach of either one of the two conditions.

We also think there was no error in the instructions given concerning what would amount to a waiver of the condition that a sale, except at retail, without written consent, would operate as a forfeiture. The court told the jury that the condition might be waived, but that they could not find such a waiver unless they found the property was sold with the knowledge and consent of the mortgagees. This was certainly going as far as could be asked. If the jury have not taken a proper view of the testimony their course cannot be reviewed in this court. Their finding has not been disapproved by the court below, and we may fairly presume it was justified.

The objection to evidence of the insurance of the property by the mortgagees for their own protection is not well

LELAND V. COLLVER.

taken. Where there is a covenant to insure and it is not kept, the mortgagee may very properly insure, and can add the premium to his debt, if fair and reasonable.

Objection was also made to the reception of testimony of certain remarks of A. B. Moore, the husband of Nancy Moore, the plaintiff, as not *res gestæ*, and therefore incompetent. One of these was a declaration made about the time of the removal of the goods to his wife's store, that he had got a whip row on Illenden & Collver, and intended to keep it. The other was, that the mortgage was worthless, and he was going to beat them out of the mortgage if he could.

The evidence showed, or tended to show, that in the transaction of the business of Mrs. Moore she was practically a cypher, and that Moore had entire control and did as he chose. If this testimony had any materiality at all, it was to show notice of the defendant's rights, or such conduct as would justify them in proceeding to an enforcement of them. In both these particulars it was admissible under such circumstances to urge and to assume that she knew what he knew and intended what he intended, and perhaps, still further, to urge that she was merely a figure head and her husband the actual dealer. Where husband and wife are engaged in business on such terms we should not be authorized to find error in the admission of proof of his conduct and statements unless evidently foreign to the issue and to his authority, and plainly prejudicial in its tendency to the rights of the parties. We are unable to see how it could prejudice any one except on grounds which made it legally admissible as conduct which it was material to show.

We find no error in the record, and the judgment must be affirmed, with costs.

The other Justices concurred.

WYANDOTTE ROLLING MILLS CO. v. ROBINSON.

Wyandotte Rolling Mills Company v. William D. Robinson.

Superior court of Detroit: Rules of practice: Time to appear and plead. The superior court of Detroit has no authority under the statute to provide by rule not approved by the supreme court for defaulting a defendant sued by declaration within ten days after service.

Rules of practice: State policy: Uniformity. It has been the clear policy of the state for many years, evidenced by constitutional provision and by legislation, to secure uniformity in all the tribunals of the same class as to substantial matters of practice; and the superior court of Detroit, as respects civil jurisdiction, is a tribunal of the same class as the circuit courts.

Rule to plead: Time: Statutory regulation: Superior court of Detroit: Circuit courts. The commencement of suits by declaration being a statutory innovation, so that no established common-law practice exists to govern, the fixing of a reasonable time within which to plead after service is within the scope of the general practice of the circuit courts; and it should be fixed either by statute or by court rule; but the legislature having by statute fixed the period at twenty days for the circuit courts generally, it is not within the power of a court of like jurisdiction subsequently created to shorten this period to ten days, in the absence of statutory provision clearly conferring such authority.

Superior court of Detroit: Authority to make rules: General rules of practice. The authority given to the superior court, by its original organic act (*Laws 1873, p. 61*), to make and adopt rules of practice for such court in respect to times for pleading, etc., does not empower that court to interfere with the legislative regulation concerning actions commenced by declaration, and under the amendment of 1875 (*Laws 1875, p. 6*), the power of the superior court to adopt any general rule of practice is made subject to the condition of approval thereof by the supreme court.

Submitted on briefs June 30. Decided October 4.

Error to Superior Court of Detroit.

Moore & Moore, for plaintiff in error.

Griffin & Dickinson, for defendant in error, argued that the question of time for appearing and pleading is not one of absolute right, but one of convenience to the court, and is not in the domain of those powers which the legislature alone can exercise and cannot delegate: *Wayman v. Southard*, 10 *Wheat.*, 42; that the legislature can confer upon courts the power to prescribe their own rules of practice: *Bank v. Halsted*, 10 *Wheat.*, 51; *Beers*

WYANDOTTE ROLLING MILLS CO. v. ROBINSON.

v. Houghton, 9 Pet., 329; and that the rule in question comes within this class: *Vanata v. Anderson*, 3 Bin., 417; *Barry v. Randolph*, Ib., 277; *Dubois v. Turner*, 4 Yeates, 361; *Wayman v. Southard*, 10 Wheat., 1; *U. S. Bank v. Halsted*, 10 Wheat., 51; *Thompson v. Hatch*, 3 Pick., 512; *Yan v. Mead*, 5 McLean, 272; that when a local court of peculiar organization has express power conferred upon it by statute to adopt rules of practice, the appellate court has no right to control its discretion in this regard unless it has abused its authority or violated some law: *State v. Smith*, 44 Mo., 112; that the statute confers the power upon the superior court to adopt such a rule; and that if any doubt exists on that subject, the practical construction given to the statute ought to have great weight in determining the question: *Stewart v. Laird*, 1 Cranch, 299; *Rogers v. Goodwin*, 2 Mass., 478; *State v. Mayhew*, 2 Gill., 487.

GRAVES, J:

The superior court of Detroit having, without the sanction of this court, adopted a rule which it construes as authorizing a defendant sued by declaration to be defaulted for want of a plea within ten days after service of declaration, the defendant in error obtained judgment in that court against the company on a ten-day default in a suit so commenced.

The company removed the case to this court by writ of error, and although a point is made upon the proof of service of the declaration, the only important question is, whether the default in point of law is sufficient to support the judgment against the objection made to it. In considering the question it is deemed best to waive controversy about the correctness of the construction which the court below has given to its own rule, and at once inquire whether the court is authorized to maintain on its own authority a ten-day rule to plead in actions commenced by declaration.

WTANDOTTE ROLLING MILLS CO. v. ROBINSON.

For many years it has been the clear policy of the state to secure uniformity in all the tribunals of the same class in all substantial matters of practice, and this is discoverable not only in legislation, but in the constitution. As promotive of this policy and to erect a guard against the discordance to be naturally expected if each tribunal were left to establish its own code of rules, it was ordained by the constitution that one tribunal, and that the court of last resort, should by general rules establish, modify and amend the practice in the circuit courts.—*Art. VI., § 5.* The same idea has been often and in various ways acted upon by the legislature, and in many instances the end has been achieved by specific regulations on particular points. Among the provisions giving power to the supreme court to make rules for the circuit courts and other courts of the same class, like the superior court of Detroit, we cite the following:—§§ 4912, 4921, 4927, 4945, 5069, 5088, 5089, 5795, 5904, *C. L.* Section 6059, being § 5 of the act to supply lost records, papers, and proceedings in courts of record, declares that “the supreme court may make general rules for proceedings under this act, and such rules when made shall govern all inferior courts.” Section forty-three of the water-craft act, being § 6688 of the compilation, gives to this court the power to make any rules deemed necessary for the regulation of proceedings under the act, not conflicting with its provisions; and the forty-seventh section, being § 6692 of the compilation, declares that the proceeding and practice under the act shall be the same as in personal actions at law, except as therein otherwise provided, so far as applicable. Again, it is not given to the probate courts to permanently establish their own code of rules. The statute says “the supreme court of this state shall have power from time to time to make uniform rules for regulating the proceedings in all the probate courts of the state, and to alter, amend or modify the same as it may judge necessary in all cases not expressly provided by law.”—§ 5232, *C. L.* And the legislature have even gone so far as to confer on this court the authority to make rules

WYANDOTTE ROLLING MILLS CO. v. ROBINSON.

to limit in certain cases the power and discretion of circuit court commissioners and to regulate their action.—§§ 5181, 5591, 5592, C. L.

In reference to many things not in their nature beyond the scope of court regulation, the legislature has itself directly intervened and made specific regulations by statute.

For example, it is provided by § 5074 that the equity calendar at any regular term shall not be taken up until the issues of fact have been first disposed of, unless by special order of the court.

Sections 5723 and 5724 provide in substance that in all suits commenced by declaration the defendant shall have twenty days to plead in after service. Section 5894 prescribes what time shall be allowed the adverse party for attending after notice in the matter of taking a deposition. Section 5954 gives the time within which a plaintiff must deny by affidavit the defendant's verified set-off if he would prevent the verification of the set-off from being considered *prima facie* true. Section 5973 declares that notice of trial of any issue of fact in a circuit court shall in all cases be served at least fourteen days before the first day of the court at which the trial is intended to be had. Sections 6188 and 6189 require that in specified cases the defendant must be charged in execution in three months, etc.

Proceedings by way of suggestion to recover damages for rents and profits are required to follow the practice as regulated in personal actions, including of course the provision fixing the time for pleading.—§§ 6247, 6257, 6395.

The water-craft law provides that there shall be ten clear days' notice of trial.—§ 6670. In replevin the rule to plead must be the same as in personal actions.—§ 6748. In *scire facias* to annul letters patent and vacate and annul acts of incorporation, twenty days are expressly allowed for pleading: §§ 7064, 7067; and in certain cases on information in the nature of a *quo warranto* the time for pleading must be the same as in personal actions commenced by declaration, referring of course to the specific regulation by

WYANDOTTE ROLLING MILLS CO. v. ROBINSON.

statute giving twenty days.—§§ 7081, 7084. These references are sufficient to show the course of policy to be as stated. True, there exist some exceptional and provisional regulations.—See §§ 4945, 5660, 5974, 6240, 6511 and 7103. And there can be no doubt of the power of every court of record, when, not forbidden, to ordain suitable rules to apply to matters of practice not already regulated by the legislature or the supreme court. But there is nothing in all this contrary to the general policy before mentioned. Proceedings may be devised by the legislature of an anomalous character and requiring rules in the opinion of that body equally anomalous, and so too there may be incidents specifically peculiar in the exercise of jurisdiction in some particular direction or in reference to some special subject, and which may call for a rule or rules directly adapted to the precise emergency and the particular tribunal. These exceptional arrangements stand by themselves. They do not belong to the general stream of practice, and do not fall into it. The commencement of suits by declaration is a statutory innovation, and there never was any common-law practice to prescribe the time to be allowed a defendant for pleading when sued in that way. Still a reasonable time ought to be assured, and the arrangement of it is within the scope of the general practice of all our common-law courts of record. It must be fixed either by statute or rule of court. That the time should be the same in all the circuit courts, is not only manifestly expedient,—not only required by the policy mentioned,—but is expressly enacted.

The time is settled at twenty days and no circuit court can abridge it.

As respects civil jurisdiction, the superior court is a tribunal of the same class as the circuit courts. There are no limitations upon its powers, or any enactments affecting its action, to impeach the analogy necessary for our present purpose. The nature of the subjects of its jurisdiction, so far as the jurisdiction extends, is the same. It is a court of original jurisdiction, proceeding according to the course

WYANDOTTE ROLLING MILLS CO. v. ROBINSON.

of the common law. It is a court of record, and cases are removable from it to this court by writ of error and appeal, as from the circuit courts. There is no sound reason for exempting it from the policy referred to, or for extending to it a power in the establishment of important rules of practice not permitted to the circuit courts. There is no sound reason for making it an exception and allowing it to abbreviate according to its own discretion the time for pleading. The jurisdiction is not confined to defendants who dwell or continue in the neighborhood. Suits may be brought against persons just leaving on honest business or some other call of duty, or against persons living far from the city, and the need for as long a period as the general statute gives, in which to secure accustomed counsel and serve a plea, may be quite as great as it would be if the case were brought in the circuit court. Bearing in mind what has been said, we are brought to the question whether after all the legislature in erecting the superior court has abandoned this policy of promoting uniformity of practice in essential matters, and has sanctioned a distinction which allows that court to adopt what rules it pleases, and especially allows it to default a defendant living on Lake Superior if he fails to plead in ten days, whereas if the same party were sued for the same cause in the circuit, a court sitting only a few yards off in the same city, he would have by statute twenty days before he could be defaulted.

If the exceptional authority claimed really exists, no reason is perceived why, if the court should so incline, it might not reduce the time to five days, or even to one.

As previously noticed, the same statute which allows suits to be commenced by declaration expressly prescribes as a settled incident that the defendant shall have twenty days to plead (§§ 5723, 5724), and the bringing suit in that mode must be subject in all cases to the right thus secured to the defendant; except where an authorized regulation exists which plainly curtails it.

In its terms, as construed, the rule of the superior court

WYANDOTTE ROLLING MILLS CO. v. ROBINSON.

does cut short the right, but the question is whether it clearly appears the legislature has empowered the court to prescribe the abridgment. If it does so appear it must be in the provisions of the organic act, because there is no other legislation which favors it. Indeed, as we have seen, if we pass outside of that enactment the reasons are very cogent against it, and whether there is any thing in it to overcome those reasons and show a clear legislative purpose to empower the court to shorten the time fixed by the general statute, is now to be ascertained.

In regard to the jurisdiction, so far as it goes, and the general right to employ the means necessary to effectuate it, the law places the superior court on the same footing with the circuit courts (§§ 13 and 14, *Act No. 59, Laws of 1873*), and as originally passed it contained two sections (15 and 18) applying expressly and directly to the practice of the court. The first, section 15, was in these terms: "The practice and proceedings in said superior court shall be the same as those provided by law for circuit courts in this state, unless otherwise limited by this act; and the rules prescribed by the supreme court for the guidance and practice of circuit courts shall be the rules of said superior court, so far as the same may be applicable; but the said court may have the same power of making rules for said court as is given to circuit courts or the judges thereof."

The other section, being section 18, was as follows: "Said court may make and adopt rules of practice for such court in respect to times for pleading and serving notices of trial and other notices, and filing notes of issue. The same costs may be taxed in favor of the prevailing party as are authorized to be taxed in circuit courts."

If both of these sections had remained unaltered it is not perceived they could be fairly read as empowering the court to cut short the time given for pleading by the statute authorizing the commencement of suits by declaration; the two sections must have been construed together, and in such a manner, if practicable, as to leave operative in the

WYANDOTTE ROLLING MILLS CO. v. ROBINSON.

superior court, as in the circuit courts, the specific regulation in regard to the time to plead contained in the general act.

And in this there could have been no difficulty.

There was room enough for rules in respect to times for pleading without interfering any more than the circuit courts could interfere with the legislative regulation concerning actions commenced by declaration. In most cases there have never been direct statutory rules for the times of pleading. The subject has generally been left to the courts, and when this tribunal established a code of rules for the circuit courts it was found necessary to fix the times for pleading in other cases, because such times were not fixed by statute. But it refrained from meddling with the time in suits commenced by declaration, because such time was already defined by the legislature. Since, then, there was full scope for the operation of the provision conveying power to make rules for times of pleading, without applying it to a ground already specifically covered by statute, and a ground to which this court, with its broad constitutional authority, had not assumed to touch, it cannot be intended that the superior court was meant to be empowered to go further and regulate according to its own discretion what the legislature had already regulated and this court had abstained from touching. Again, as originally enacted, sections fifteen and eighteen were in spirit conducive to the idea that the time rule in question given by the legislature, being binding upon the circuit courts and applicable to the superior court, should be binding on the latter, and such view is not impaired by other parts of the organic act. If upon fair construction of the act as it stood before the amendment of section fifteen in 1875 the superior court could not, as we think it could not, derogate from the statute giving twenty days to plead, it seems certain that it has not been able by its own authority to do so since. In that year the legislature repealed all of that section following the word "*applicable*" and substituted this language: "Provided that

WYANDOTTE ROLLING MILLS CO. v. ROBINSON.

the judge of said court shall have full power and authority to establish from time to time such rules of practice in said court as shall have been first approved by the supreme court. The supreme court shall also direct the time when such rules shall go into effect, and the mode in which they shall be published."—*Act 7 of the laws of 1875, p. 6.*

By this amendment the legislature said in effect that thereafter, at least, no general rule should be established on the sole authority of the judge of the superior court.

It coupled his power to establish any such rule with the condition that the rule must be first approved by the supreme court, and it made the condition coextensive with the power. Both equally apply to all matters fit to be governed by general rules of court. Hence they apply to general regulations, where the statutes leave room for any, concerning the times to be allowed for pleading; and as previously stated, the rule in question has not received the approval of this court. Again, the amendment falls in with the policy of uniformity. It erects a guard against discordant regulations by subjecting any general rules the judge of the superior court may devise to the approval of this court.

As a consequence of these views, it follows that the rule of the superior court could not be employed to authorize the default entered, and that the court erred in permitting the entry of it and in giving judgment upon it.

The judgment must be reversed and the default vacated, with costs of this court, the cause being open to be proceeded in according to law.

The other Justices concurred.

WINFIELD v. ADAMS.

Elizabeth Winfield v. William D. Adams.

Execution sales of personalty: Place: In view of the property. Under the statute (Comp. L. 1871, § 6106) forbidding the sale of personalty on execution unless the same be present and within the view of those attending such sale, a sale of an interest in a growing crop of corn; made at a place distant from the field half or three-quarters of a mile, and from which the property sold could not have been seen, cannot be supported.

Growing crops: Sales on execution: Place. The query is suggested, whether a sale on execution of a growing crop of corn in separate fields on different sections, made at a place distant thirty or forty rods from one of the fields and eighty or a hundred from the other and in view of both, can be supported under the principle of *Perkins v. Spaulding*, 2 Mich., 167.

Execution levy and sale: Officer's return: Parol evidence. One claiming rights in property that has been sold on execution, by a title originating prior to the levy, is not precluded by the return of the officer from showing the real facts as to the validity of the levy and sale.

Evidence: Dealings between employer and employe: Good faith. Where an assignment to an employe, claimed to have been given in consideration of an indebtedness from the employer, partly for money loaned and partly for wages earned, is attacked as being fraudulent against creditors, evidence is admissible, as bearing upon the fairness of the transaction, to show that the money loaned was money belonging to the employe before entering into the service of the employer.

Heard June 20. Decided October 4.

Error to Calhoun Circuit.

T. G. Pray, for plaintiff in error.

W. D. Adams, in person, for defendant in error.

COOLEY, CH. J:

This is controversy over some corn to which each party claims title under one White; Adams by purchase at a sale on execution, and Winfield by an earlier purchase of the lease of the premises on which the corn had been raised.

I. Adams, who was plaintiff in the court below, to make out his title, called as a witness the constable who made the sale. It appeared from the constable's evidence that he levied on the corn August 22, 1873, as a growing crop;

WINFIELD v. ADAMS.

that it was in three fields, and was sold by him October 17, 1873. The fields were on two different sections, and were some considerable distance apart. The sale was made on the platform of a railroad station-house, in sight of two of the fields, one of which the constable estimated to be thirty or forty rods off, and the other eighty or a hundred. The third field could not have been seen from where the officer was when he made the sale, and was from half to three-quarters of a mile distant. It was the interest of White in the crop, as it stood unharvested in these fields, that was sold.

The statute forbids personalty to be sold on execution, "unless the same be present and within the view of those attending such sale."—*Comp. L.*, § 6106. Under this statute the sale of the third parcel could not be supported. Whether the sale of the others could be, we can properly express no opinion at this time. The testimony of the constable would perhaps enable it to be supported within the principle of *Perkins v. Spaulding*, 2 Mich., 157; though the distance of the officer from the property he was selling was very much greater in this case than in the one referred to. But the evidence which would affect this point is conflicting.

It was insisted for the defendant in error, that the sale could not be defeated by parol evidence showing that the officer's proceedings were not in compliance with the statute, as this would be in contradiction to his return. This point is covered by the decision in *Nall v. Granger*, 8 Mich., 450, in which it was decided that one who claimed by a title originating prior to the officer's levy was not precluded by his return from showing the real facts.

II. Winfield gave evidence tending to show that she took an assignment from White of his lease, to secure an indebtedness from him to her, a part of which was for money loaned to him many years before, and a part for wages she had earned in his service. Adams attacked the assignment as being fraudulent as against creditors, and Winfield offered to show that the money loaned to White was money which

WINFIELD V. ADAMS.

was hers before she went into his service. This was objected to and ruled out. But we think it should have been received. As bearing on the question of fraud, it was a very important circumstance if the woman had money of her own at a time when there could be no suspicion of a purpose on the part of the debtor to make use of her as a cover for his property. A loan by a servant to the employer is likely to be more or less suspicious, and whatever would fairly tend to show whether it was real or simulated, ought to be received. It is true, as the circuit judge said, that when one loans money it is presumed that it is his own; but the presumption in a case like this would be greatly strengthened by such evidence as was proposed.

Some other errors are relied upon, but the record is not sufficiently certain in its statement of the facts to justify our passing upon them. The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

Ward's Central & Pacific Lake Company v. Henry K. Elkins.

Transportation contracts: Article of merchandise: Measure of damages. The measure of damages for the breach of a contract to transport from one market to another an ordinary article of merchandise always to be found in the market, is the excess in value at the place of destination at the time when by the contract the merchandise should have arrived there, beyond its value at the place of shipment, with the agreed freight added and such expenses as under the contract the shipper would have incurred in loading and unloading, etc., had the contract been performed.

Agreement to carry by vessel: Transportation by rail: Unreasonable expense. On breach of a contract to carry by vessel an ordinary article of merchandise, the shipper will not be justified in procuring shipment by rail if the railroad prices would render it unprofitable. A person has no right to put others to an expense of such a nature as he would not as a reasonable man incur on his own account.

Transportation contracts: Duty of shipper: Immediate action: Speculating on future chances. In case of an article of specific utility for preservation,

WARD'S C. & P. L. CO. v. ELKINS.

where the circumstances are such as to justify employing any transportation which is accessible, and to render the difference in cost in transportation a proper measure of damages, the shipper is bound to seek other means of carriage immediately at hand, and is not permitted to await his leisure and speculate on future chances by making piecemeal shipments.

Evidence: Agency: Steamboat clerk: Statements. The statements of a steamboat clerk, not shown to occupy any position of general agency, are not admissible in evidence to bind the corporation employing him, as to matters not within the scope of his employment.

Evidence: Contracts: Inferences: Actual terms. Questions put to prove a contract, which call for the inferences of the witness rather than the actual terms of the contract, are improper.

Submitted on briefs June 21. Decided October 4.

Error to Superior Court of Detroit.

Moore, Canfield & Warner, for plaintiff in error, as to the evidence of statements by the steamboat clerk, cited: 14 Mich., 265; *F. & M. Bank v. Whitfield*, 24 Wend., 419; *Luby v. Hudson R. R.*, 17 N. Y., 131; *Weeks v. Lowry*, 8 Barb., 530; *Blendon v. Nicolay*, 4 E. D. Smith, 14; *Ray v. Smith*, 2 Hun, 597; *Chapman v. Erie R. R.*, 55 N. Y., 579; and on the measure of damages: *Brown v. Foster*, 51 Penn., 165; *Brackett v. McNair*, 14 Johns., 170; *O'Connor v. Foster*, 10 Watts, 418; *Cutting v. G. T. R. W. Co.*, 13 Allen, 318; *Spring v. Haskill*, 4 Allen, 112; 9 C. B. (N. S.), 632; *Wilson v. L. & G. R. R.*, 6 H. & N., 211; *Deming v. R. R.*, 48 N. H., 468; *Harrison v. Stewart*, Taney's Decis., 485; *R. R. v. Plank Road Co.*, 71 Penn., 354; *R. R. Co. v. Henry*, 14 Ill., 157; *Ward v. Central R. R.*, 47 N. Y., 29.

Alfred Russell, for defendant in error, argued that the proper measure of damages was the difference between the contract price and the price actually paid for transporting by rail, and cited: *Grund v. Pendergast*, 58 Barb., 216; *Ogden v. Marshall*, 4 Seld., 340; *The Flash*, 1 Abb. Adm., 119; *The Zenobia*, Id., 80; *Sedg. Dam.*, (4th ed.) 402-5; *Loud v. Campbell*, 26 Mich., 239.

CAMPBELL, J :

Elkins recovered damages against the plaintiff in error for failure to carry certain salt from Bay City to Chicago, in November, 1874.

Elkins was a salt dealer in Chicago, and sued upon an alleged contract whereby the plaintiff in error was to carry three cargoes of salt, of about seventeen thousand bushels in all, only one of which was taken. The cargoes were to be called for from the 15th to the 20th of November. The regular business of plaintiff in error was between Buffalo and Duluth, with power, as was claimed, to do business elsewhere on the lakes.

Elkins gave evidence tending to show that he could not get vessels to carry the salt after plaintiff's default. He had it taken by rail to Chicago in lots as he wanted it, from January to some time in April, 1875, and was allowed to recover the difference between the price agreed on with plaintiff and what he paid for the transportation by rail. This is the chief error complained of.

We do not see upon what rule this recovery can be justified. The damages to which Elkins was entitled, if any, would be such as would have placed him in the position he would have occupied had the salt been taken to Chicago by vessel as agreed. It was not an article of specific utility for preservation, but an article of merchandise, and only valuable as such. The only advantage he could have gained by a timely shipment according to contract would have been the excess of the value of salt in the Chicago market at the date when it should have arrived, beyond what it was worth in Bay City and the expenses of loading, shipment and delivery at his warehouse in Chicago. If there was no such excess in value at that time, then he was not damaged. If there was such an excess, then he was entitled to that, and nothing more.

He would not have been justified in procuring shipment by rail, if the railroad prices would have rendered it unprofit-

able. There are, no doubt, cases where property is of such a nature, or where the necessity of having it at a certain point is so imperative, that the circumstances may justify employing any transportation which is accessible, and may render the difference in cost of transportation a proper measure of damages. But this can never be proper in regard to ordinary articles of consumption, always to be found in the market, and only valuable to the owner for their merchantable qualities. A person has no right to put others to an expense of such a nature as he would not as a reasonable man incur on his own account.—*Le Blanche v. London & N. W. R. W. Co., L. R., 1 C. P. D., 286.*

When such a necessity exists, it is maintained only as a necessity, and allowed because of its urgency. If such a rule is ever applicable, it cannot be satisfied by allowing a party, instead of seeking other means of carriage immediately at hand, to await his leisure and speculate on future chances, and make shipments piecemeal, as was done here.

It is altogether likely that after the close of navigation, and as the winter goes on, prices may rise so as to warrant shipments by rail, when this would not have been profitable earlier; and it may be possible, after paying railroad rates, to make as much profit as if the salt had been received by steam on the lakes and put in market in the fall at fall rates. It would be absurd to say that these deliberate winter shipments were necessitated or justified by a failure to get shipping facilities during the season, or near the close of navigation in November. It would be equally unjust to allow the owner of the salt to speculate on the chances of a market without risk to himself.

The rule of damages should have been as previously indicated, and should in no case exceed the damages actually incurred. A party who has lost nothing by a breach of contract is not entitled to damages of a substantial character.

We think there was also error in allowing the statements of a steamboat clerk, who was not shown to occupy any

position of general agency, to be received in evidence to bind the company; and that improper questions were allowed, which called for the inferences of a witness rather than the actual terms of the contract in suit. But we do not enlarge upon these, as they are not likely to arise again, and the main issue is upon the question of damages and the real terms of the agreement, as absolute or conditional.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

Franklin Moore, impleaded with others, v. Ellen L. Foote.

Partnership dealings: Husband and wife: Frauds of husband. A wife holding a lawful and just claim against a firm of which her husband is a member, is not precluded from recovering upon it because of any incidental wrong that may result to one of the other members of the firm in consequence of an alleged fraud of her husband to which she was in no wise a party; there is no rule of law compelling a wife to assume the consequences of her husband's frauds, or to guaranty his good conduct.

Partnership: Due-bills: Payment: Transfer of title. A firm having given a non-negotiable due-bill to one of its members for money borrowed of him, the delivery thereof to his wife as payment upon a debt due from him to her transfers the title and authorizes her to enforce payment, notwithstanding the amount stands credited to the husband on the books of the firm; but the due-bill being non-negotiable, a settlement of the matter with the husband by the firm without knowledge of its transfer would probably be a complete defense.

Partnership: Dealings of individual member: Husband and wife: Creditors. Where such due-bill has been given up to the firm and their note taken for the amount by an arrangement between the creditor and her husband, the fact that the credit still remains to the husband on the books of the firm, and the allowance thereof in his favor in a subsequent settlement of the partnership matters, cannot prejudice the claim of the wife upon the note.

Partnership: Dealings between husband and wife: Agency: Creditors. In a dealing between a wife who is a creditor of a firm and her husband

MOORE v. FOOTE.

who is a member of the debtor firm, in reference to an exchange of a due-bill held by her against the firm for a firm note, the husband is in no proper sense the wife's agent; and her rights in the matter are precisely what those of any other creditor dealing in like manner would be.

Submitted on briefs June 21. Decided October 4.

Error to Superior Court of Detroit.

Meddaugh & Driggs, for plaintiff in error, argued that the firm due-bill in Foote's hands was at most but evidence that he had advanced to the partnership the amount thereof, and his right of recovery thereon would depend upon and be subject to an accounting between him and the firm; and his transfer of the due-bill to his wife, in payment of his antecedent indebtedness to her, would in legal effect operate only as an assignment to her of the firm indebtedness to him, and would give her no greater right as against his co-partners than he had; that in the transaction of giving Mrs. Foote the firm note in lieu of the due-bill and other notes, Foote represented all the parties to it, and was the agent of both the firm and his wife; that the law presumes him to have had knowledge of the facts that his firm was insolvent and that he was largely indebted to it, and his knowledge was under the circumstances her knowledge; that neither her rights nor her remedy therefor, as to so much of the note as represented the due-bill, was altered or affected by the giving of the note; that the essence of the transaction was nothing else than an attempt by Foote to pay his individual debt with the partnership obligation; and they cited: *Pars. on Part.*, 202, notes c and d, 285-6, note r; *Simrall v. O'Bannon*, 7 B. Mon., 608; 1 *Pars. on Bills and Notes*, 211; *Wilson v. Forder*, 20 Ohio St., 89, and cases cited.

William Jennison, for defendant in error, to the point that when one partner has made a firm note payable to himself for money loaned by him to the firm, the assignee

MOORE v. FOOTE.

of that note may sue and recover upon it, cited: *Davis v. Brigg*, 39 Me., 304; *Thayer v. Buffum*, 11 Metc., 398; *Temple v. Leaver*, 11 Cush., 314; and that even where such note was given for the individual debt of a partner, an endorsee without notice could recover against the firm: *Chagvèrnes v. Edwards*, 3 Pick., 5; *Story on Part.*, § 133, p. 226-7; *Edwards on Bills*, p. 100 (Marg.); *Pars. on Part.*, 208, 212; *Haldeman v. Middleton*, 28 Penn., 440; *Munroe v. Cooper*, 5 Pick., 412; 19 Pick., 102; that the chief clerk had authority to give the firm due-bill: *Tillier v. Whitehead*, 1 Dall., 269; *Gow. on Part.*, 55 and note; that the due-bill, though non-negotiable, was transferable, and the assignee could sue in her own name: 2 Comp. L., § 5775; that the prior indebtedness of Foote to plaintiff made her a *bona fide* purchaser subject to equities, of which there were none here: *Bostwick v. Dodge*, 1 Doug., 413; *Outhwite v. Porter*, 13 Mich., 533; that it cannot be said that plaintiff took the due-bill or the note with notice that it was a payment of the private debt of Foote, for the due-bill represented the debt of the firm to Foote, which he merely transferred to plaintiff, and the payment to her was in no sense a payment with the funds of the firm: *Smith v. Lusher*, 5 Cow., 688; that the transaction between Foote and the firm, when he received the firm due-bill for the New York draft, was evidently intended as a specific temporary loan, not a payment or a contribution to the general partnership affairs; that if Mrs. Foote had sued upon the note before the dissolution of the firm, evidence of Foote's indebtedness to the firm would be incompetent on the grounds, (1) that until an accounting was had no balance in law existed, and (2) that no set-off could be allowed, even had there been a balance, for there being several defendants, the demand set off must be due to all of them jointly: 2 Comp. L., § 1679, Sub. 5 and 6; 14 Mich., 152, 170; *Waterman on Set-off*; that even if the plaintiff could not have

MOORE v. FOOTE.

sued on the due-bill, yet the surrender of it to the firm, and the giving of a new firm note with full knowledge of the transaction, and before dissolution, was a waiver by the firm of any claim against the due-bill; that Foote, being a partner, clearly had authority to give the firm note for the firm debt; that the firm having enjoyed the proceeds of every dollar included in the new note, could have waived any set-off to the due-bill, and so could one of the partners: *Pars. on Part. (Marg.)*, 200-2; 12 B. Mon., 11; that the plaintiff was therefore a *bona fide* purchaser of the note in suit on the day of its date and while the firm was in existence, and the consideration was surely valid, consisting as it did of a debt the firm had long owed her, and a debt it owed her husband and which he was willing and had the right to transfer; that the subsequent dealings between Foote and Moore, of which plaintiff had no knowledge, whereby Foote received credit for the amount of the New York draft, could not prejudice the plaintiff, whose rights had before been fixed; that when Foote delivered to plaintiff the firm note in suit, his agency in the transaction ceased, and she cannot be bound by the subsequent acts of the firm; and that it was through the negligence of the clerk, and not from any fault in Foote, that the transaction was not properly entered up in the firm books.

COOLEY, CH. J:

This case is brought to this court for review upon the following finding of facts and law:

"In the above entitled cause I find the following facts:

"1. On the 13th day of June, 1874, the defendants were partners in trade, and had been such for more than eight years prior thereto, doing a wholesale grocery business in the city of Detroit, under the name of Moore, Foote & Co.

"The plaintiff is the wife of the defendant Foote. On

MOORE v. FOOTE.

the date above mentioned, the defendant Foote signed and executed in the said firm name a certain promissory note, for the sum of three thousand two hundred and thirty-six dollars and ten cents, bearing date June 13, 1874, payable on demand to the order of said Ellen L. Foote, with interest at the rate of ten per cent. per annum, after maturity.

"2. On the 6th day of December, 1870, the defendants being indebted to the plaintiff in the sum of one thousand two hundred and three dollars and three cents, gave to her their promissory note, signed in the firm name, bearing date the day and year last aforesaid, and for the last mentioned sum, payable on demand.

"The amount due on this note was reduced by successive endorsements, as follows:

January 5, 1871.....	\$100 00
December 12, 1872.....	25 00
December 20, 1872.....	145 00
Total of endorsements.....	<u>\$270 00</u>

"Leaving a balance on the note at that date, of nine hundred and thirty-three dollars and three cents. On the 2d of December, 1872, the defendants' firm executed and delivered to plaintiff its certain other promissory note, payable on demand, for two hundred and fifty-two dollars and sixty-three cents, being for interest due and unpaid on the last mentioned note.

"The two last notes remained unpaid, and were in the hands of and owned by the plaintiff of the 13th of June, 1874.

"Sometime in 1873, the defendant Foote, being the holder and owner of a draft on New York for one thousand seven hundred dollars, less exchange, being one thousand six hundred and ninety-seven dollars and four cents, loaned the same to the firm and received a non-negotiable due-bill at one day therefor, signed by the chief clerk of the defendants, in their firm name. This loan was cred-

MOORE v. FOOTE.

ited to Foote upon the cash blotter of the firm. Foote was at the time indebted to his wife, the plaintiff, for money previously loaned to him by her, in an amount exceeding the amount of said draft, and transferred the due-bill to the plaintiff in part payment of his indebtedness to her.

“The defendant Moore had no knowledge of such due-bill, or of its transfer.

“3. On the said June 13th, said two last mentioned notes and the due bill being still unpaid, Foote received the same from the plaintiff, and procuring the interest to be calculated by said clerk, surrendered up to him the notes and due-bill, and himself executed a new note,—the one here in suit,—for the amount of principal and interest called for by the notes and due-bill, surrendered as just stated, and in lieu thereof, delivered the same to the plaintiff, none of the other defendants having knowledge or assenting to the transaction, and no entry thereof being made upon the books of the said firm, by said clerk or any other person.

“4. The note in suit was first presented for payment, to the receiver hereinafter mentioned, on the 12th of April, 1875. It was never paid. The interest thereon from April 12, 1875, to the present date, January 27, 1876, is two hundred and sixty-seven dollars and forty cents. The total amount of said note to date, including principal and interest, is the sum of three thousand four hundred and ninety-two dollars and twenty-eight cents.

“5. In the year 1874, and for some years prior thereto, the affairs of the firm were in great confusion, and the partnership thoroughly insolvent. A bill was filed on June 24, 1874, by defendant Moore, in this court, for a dissolution of the partnership and a winding up of its business. Francis Palms was appointed receiver. Upon a statement of the accounts of the several defendant partners, defendant Foote insisted upon, and was allowed and credited in his account with the sum of one thousand seven hundred dollars, so loaned as aforesaid by him to the firm. On the 16th of January, 1875, the defendant Moore came to an

MOORE v. FOOTE.

adjustment with defendant Foote, by which Moore agreed, in consideration of receiving the assets of the firm, to assume the liabilities thereof, and gave bond to Foote to carry out such agreement, and release him from all liability on the firm debts. At the time of such adjustment and agreement, the plaintiff's claim to the said money, so loaned, did not appear upon any of the firm books or papers, nor did Moore know of the same, or that plaintiff held the note sued upon, or that it had been given; the only claim of plaintiff which did appear upon the books, or of which Moore had knowledge, was for the amount due upon said notes of December 6, 1870, and December 2, 1872. The plaintiff had no dealings directly with the firm, but only through her agent, defendant Foote.

"I find as conclusion of law, based upon the foregoing facts:

"*First*, That the defendants are indebted to the plaintiff in the total amount of principal and interest of said note, as above stated, viz.: three thousand four hundred and ninety-two dollars and twenty eight cents;

"*Second*, That the plaintiff is entitled to a judgment in this suit, against the defendants, of the sum of three thousand four hundred and ninety-two dollars and twenty-eight cents, and costs of suit to be taxed.

"February 5, 1876.

(Signed)

LYMAN COCHRANE,

"Judge of the Superior Court of Detroit."

An amended finding was afterwards filed, which, however, does not affect the questions of law to be determined.

Is this judgment correct? It is said that it is not, because it consummates a fraud, designed and perpetrated by George Foote upon his copartners, and especially upon the plaintiff in error, who has already allowed and paid to George Foote the amount of the note in suit, in full confidence that he was creditor of the firm to that amount, and with no reason to suspect the contrary. This may all be true and still the defendant in error be entitled to the judgment she

MOORE v. FOOTE.

has recovered. If the note is legally and equitably her property she is not precluded from recovering upon it because of any incidental wrong that the recovery may cause to another in consequence of the fraud of her husband to which she was in no wise a party. There is no rule of law which compels her to assume the consequences of her husband's frauds.

It will probably not be disputed that when Mrs. Foote took from her husband the firm due-bill she acquired the title thereto, and might have enforced payment thereof, notwithstanding the amount stood credited to her husband on the books of the copartnership. But as the due-bill was not negotiable, had the firm settled with George Foote without knowledge that it had been transferred, the fact would probably have constituted a complete defense to any suit on the due-bill on her behalf.

It is said the case is made no better for Mrs. Foote by the taking up of the due-bill and the giving of the note in suit, because in that transaction George Foote must be regarded as acting as agent as well for his wife as for the copartnership, and his wife must consequently be chargeable with notice of the fact, well known to him, that on the partnership books the amount still stood to the credit of her husband. That method of charging the parties respectively with knowledge of what was known by George Foote would make the argument defeat itself; for while Mrs. Foote would be chargeable with notice of the copartnership credit, the firm on the other hand would be chargeable with notice of the giving of this note to Mrs. Foote, and if Moore subsequently settled with Foote on the basis of Foote being entitled to the money, he would do so in his own wrong. But we consider the whole argument far-fetched. Mr. Foote was in no proper sense his wife's agent in these transactions. He was one of her debtors; and when he gave this note on behalf of the partnership as a substitute for the due-bill, his wife had a legal right to receive and rely upon it. If Mr. Foote defrauded his associates in these

MOORE v. FOOTE.

transactions, his wife is not responsible. She does not guaranty his good conduct, and she is entitled to all the rights of any other creditor. Had the note been given to any other creditor it would have been collectible, and it is no less collectible in her hands.

The judgment must be affirmed, with costs.

The other Justices concurred.

Ann Burke v. John D. Burke and another.

Statute of descents: Inherited estate of deceased minors: Statute construed.

By the statute (Comp. L. 1871, § 4308, Sub. 6), where upon the descent of an estate to children, one of them dies under age, not having been married, his share of the inheritance goes to those who would have taken the same had such child died in the lifetime of the ancestor, *i. e.*, to the other children of the intestate, and to the issue of such thereof as may have died, by right of representation; the intent being rather to give a new destination to that portion of the parent's estate which has in some measure failed to accomplish the design of the legislature by the premature death of such child, than to provide a new and distinct rule of distribution for such child's own estate.

Infants: Inherited estates: Rules of descent. This statutory provision applies only to estates inherited from the parent, and estates acquired by the minor from the parent in any other way than by inheritance, or acquired from any other source, are not affected by this provision, but are governed by the other statutory rules of descent.

Construction of statutes. In case of an apparent conflict between different subdivisions of the same section of the statute, the entire section must be examined, and such a construction put upon it as, if possible, will harmonize and give effect to the various provisions according to the evident intent, so far as the same may be gathered from the language used.

Statute of descents construed: Inherited estate of minors. Construing the statute of descents (Comp. L. 1871, § 4308), it is held that the first five subdivisions seem to have reference to and provide for the descent of the real estate of intestates generally, without reference to the manner in which, or source from whence the intestate acquired or derived his title; the sixth and seventh subdivisions go back to the source from whence the deceased minor intestate derived his title, and provide how in certain cases a minor's inherited estate shall descend; and the sixth subdivi-

BURKE v. BURKE.

vision is not a mere proviso to the fifth alone, but limits all the preceding subdivisions to which it is applicable, and was intended as an exception to the general plan before laid down.

Submitted on briefs June 21. Decided October 4.

Error to St. Clair Circuit.

Miles & Coe and William T. Mitchell, for plaintiff in error, cited: *Nash v. Cutler*, 16 *Pick.*, 461; *Rowley v. Stray*, 32 *Mich.*, 70.

H. W. Stevens, for defendants in error, cited: *Nash v. Cutler*, 16 *Pick.*, 461; *Sheffield v. Loring*, 12 *Mass.*, 490; *Runey v. Edmonds*, 15 *Mass.*, 291; 18 *Cal.*, 96; 36 *Cal.*, 329.

MARSTON, J:

This case was commenced to determine who were the heirs at law of Thomas Burke, Jr., deceased. The facts as found by the circuit judge were as follows:

"Thomas Burke, Jr., died while yet an infant under the age of twenty-one years, unmarried and intestate.

"His father, Thomas Burke, Sen., died intestate, some two or three years before *his* death, leaving him, his widow, the said Ann Burke, the said Thomas Burke, Jr., now dead, and two other sons, John and George Burke, who were brothers of the half blood of the said Thomas Burke, Jr. All the estate of the said Thomas Burke, Jr., now deceased, including the land mentioned in the petition, came to him by descent from his father, the said Thomas Burke, Sen. Prior to the death of the said Thomas Burke, Jr., the estate of his father had been fully administered, closed, and settled, and the land in the petition had been set off to him, the said Thomas Burke, Jr., as a portion or all of his share of the estate, and the widow of Thomas Burke, Sen., and mother of Thomas Burke, Jr., now claims title by *part 3 of Sec. 4309*, that she is entitled to share equally with his two brothers in his estate."

BURKE v. BURKE.

From these facts the court came to the conclusion that *part 6 of § 4309* governed the case, and that the mother was not entitled to any share in the estate.

The only question here raised is as to the correctness of this conclusion from the facts found.

Plaintiff in error, the mother of Thomas Burke, Jr., claims that this case comes under, and is governed by the third subdivision of § 4309, which reads as follows:

"Third, If he shall leave no issue, nor widow, nor father, his estate shall descend in equal shares to his brothers and sisters, and to the children of any deceased brother or sister, by right of representation: Provided, That if he shall leave a mother also, she shall take an equal share with his brothers and sisters."

Defendants claim that the sixth subdivision governs, which reads as follows:

"Sixth, If any person shall die leaving several children, or leaving one child, and the issue of one or more other children, and any such surviving child shall die under age, and not having been married, all the estate that came to the deceased child by inheritance from such deceased parent, shall descend in equal shares to the other children of the same parent, and to the issue of any such other children who shall have died, by right of representation."

The third subdivision, if standing alone, would clearly apply to, and govern this case.

If there is an apparent conflict between the third and sixth subdivisions, we must examine the entire section, and, if possible, harmonize and give effect to the various provisions, according to the evident intent of the legislature, so far as that intent may be gathered from the language used. The first five subdivisions of this section would seem to have reference to, and provide for, the descent of the real estate of intestates generally, without any reference to the manner in which, or source from whence the intestate acquired or derived his title. The sixth and seventh subdivisions go back to the source from whence the deceased minor intestate

BURKE v. BURKE.

derived his title, and provide how in certain cases a minor's inherited estate shall descend. Between the fifth and sixth subdivisions are the words, "*Provided however,*" and plaintiff insists, therefore, that the sixth subdivision only modifies the fifth, consequently that the third is in no way affected by the sixth. I am not satisfied that this is the correct view. I do not see how a case coming within the fifth rule could be in any way modified or affected by the sixth, and to so limit it would render the sixth wholly nugatory. If this sixth subdivision was intended as a mere proviso, it was not limited to the fifth, but was a proviso to all of the preceding rules or subdivisions to which it could be made applicable. It was intended as an exception to the general plan before laid down. As was said by *Shaw, Ch. J.*, in considering a similar proviso, "the whole purpose is the descent of intestate estate; and we think the effect is, that where upon the descent of an estate to children, one of them shall happen to die in infancy, that is, at any time before arriving at the age at which, by law, he has the power of disposing of his estate, and before he has by marriage contracted obligations and established new connections which change his relative situation to others, his share of the inheritance, that is, his portion of the intestate estate, for the descent of which the statute is now providing, shall go just in the same manner as if such child had died in the lifetime of the ancestor, or, in other words, to those who would have taken the same share if such child had not existed. It directs that it shall go to the other children of the parent from whom it came, which it would have done, had the child so dying not been in existence at the time of the decease of such parent. It is rather giving a new destination to that portion of the parent's estate, which has in some measure failed to accomplish the design of the legislature by the premature death of such child, than to provide a new and distinct rule of distribution for such child's own estate."—*Nash v. Cutler*, 16 *Pick.*, 498. It has therefore accordingly, and very properly, been held that this proviso

BURKE v. BURKE.

applies only to estates inherited from the parent; that estates acquired by the minor from the parent in any other way than by inheritance, or acquired from any other source, are not affected by this proviso, but are governed by the previous rules.—See case last cited; also, *Estate of DeCastro v. Barry*, 18 Cal., 97; *Estate of Donahue*, 36 Cal., 329.

The conclusion of the circuit court was correct, and the judgment must be affirmed, with costs.

The other Justices concurred.

Thaddeus G. Smith v. Henry Brown and another.

Justice's courts: Return day: Waiting an hour: Jurisdiction. In the absence of any statutory requirement, failure of a justice of the peace to wait an hour after the time specified in the process for the defendant to appear is at most but an irregularity, and not a jurisdictional defect open to collateral attack.

Variance: Bill to quiet title: Deed: Description of premises. Under a bill to quiet title, where complainant claims under a sheriff's deed, the objection for variance between the deed and the bill in description of premises, in that the deed, though properly otherwise specifying the lots and the name of the village and plat, omitted the county and state, is held to be without force where by their proceedings both parties have treated such deed as applying to the specific lots in question.

Fraud: Evidence: Good faith. Fraud being charged, self-contradictions, vague and partial explanations from witnesses not likely to be well informed, failure to call others presumably acquainted with controlling circumstances, destruction of letters connected with the controversy, and inability, real or feigned, to reveal their contents, are incidents inconsistent with a claim of good faith.

Fraudulent conveyances: Husband and wife: Execution sale. A husband having transferred to his wife, pending divorce proceedings between them, certain village lots which the latter occupied as a home, a secret conveyance thereof from the wife back to the husband, made after judgment, and on the eve of execution, against the wife and in favor of her solicitor in said divorce proceedings for the value of his services therein, is held, under the circumstances of this case, to be fraudulent and void as against the levy and sale on such execution.

Heard June 9. Decided October 10.

* Appeal in Chancery from Genesee Circuit.

SMITH v. BROWN.

T. G. Smith, in person, and *W. Newton*, for complainant.

Foster & Beebe, for defendants.

GRAVES, J:

The defendants, being husband and wife, in 1870 were living apart. He had his residence at Decatur, in Van Buren county, and she hers at Fenton, in Genesee county. He was possessed of considerable property, and among other items owned lots three, four, six, seven, and eight in block two of Wakeman's addition to Fenton. She occupied these lots, living in a dwelling house standing on lot eight, and having with her three daughters, children of the parties. Their son Walter, a lad then about seventeen, stayed with his father at Decatur.

In August of that year a decree of divorce from the bonds of matrimony was granted by the circuit court for the county of Van Buren in chancery, in a suit that had been instituted in her name. No allowance seems to have been made to her in the cause, but about the time of the decree, or shortly after, he gave to her his personal undertaking in writing for one thousand dollars.

In 1872 she employed complainant, who was a lawyer at Fenton, to take steps in her behalf to cause the decree of divorce to be set aside and the bill to be dismissed, and he proceeded to do as she desired, and succeeded. This occurred in September of that year. Within a very few days thereafter, and on the 24th of the same month, he filed a bill as her solicitor, in Genesee county, against her husband, for a divorce from bed and board. The subpoena to answer was issued on the same day, was made returnable on the 12th of October, and was personally served on the first day of that month. A day or two previous Mrs. Brown had gone to Decatur, and was with her husband at the time of this service. Immediately after such service Brown drew up a warranty deed to her for the five lots before mentioned, and with her went to Mr. Field, a justice, and there exe-

SMITH v. BROWN.

cuted it, caused it to be attested by the justice and one Myers, and then handed it to her.

It was not acknowledged, but in all other respects was complete.

Immediately, or at least very shortly after this receipt of the deed, Mrs. Brown, accompanied by her son Walter, who went for a visit, returned to Fenton. And on her reaching Fenton, and on the 3d of October, or within a day or two thereafter, she called on complainant and instructed him to stop the divorce case. He asked her reason for so doing, and she replied that her husband had deeded these lots to her. Nearly two months later, and on the 30th of November, Brown filed his answer. No further proceedings were taken in the cause. In about a week after this answer was filed, and on the 7th of December, complainant sued Mrs. Brown before a justice, for his services in these matters. The summons was made returnable December 16th, and was personally served on the 7th. She failed to appear at the time the summons was made returnable, and complainant appeared and proceeded to trial at that time in her absence, and obtained judgment against her for one hundred and twenty-five dollars damages and two dollars and fifty cents costs of suit. No attempt was made to disturb the judgment, and no execution was issued by the justice. About ten days after this judgment Mrs. Brown received from her husband, through the mail, a drawn warranty deed of the foregoing lots from her to him, and which she was desired to execute and acknowledge and return to him.

She accordingly executed and acknowledged it on the 31st of December, and at some time thereafter sent it to him by mail.

On the 5th of February following, complainant caused a transcript of his judgment to be filed in the circuit court, and procured an execution to be issued thereon. The sheriff levied on lots three, four, six, and seven, block two, of Wakeman's addition to the village of Fenton, according to the recorded plat thereof, and in due time the same were sold

SMITH v. BROWN.

to complainant and afterwards deeded to him by the sheriff for want of redemption. He then obtained possession by summary proceedings, and Brown brought ejectment against him. Thereupon he filed the present bill, alleging that Mrs. Brown acquired the title by the first deed, and that the second transaction was fraudulent as against him. Mrs. Brown made no appearance, and allowed the bill to be taken as confessed as to her. But her husband answered, and proofs having been taken, the court below granted relief, and Brown appealed.

He makes three objections to the decree:

First, That the judgment against Mrs. Brown was void;

Second, That the sheriff's deed relied upon does not describe the premises referred to in the bill;

Third, That in the transaction covering the giving of the two deeds no fraud was meditated or committed against complainant or any other creditor.

The ground of the first objection is, that the transcript of the justice did not express that he waited one hour for the defendant to appear. The statute does not specify that the justice in case of personal service shall wait at all for the defendant after the arrival of the hour for appearance stated in the summons.

It is the general and very proper course no doubt in such cases to wait a reasonable time for the defendant, and which, by analogy to the time fixed for waiting for the plaintiff, is commonly taken to be an hour. The prevalence of the practice has been owing in some degree most likely to the course in New York. But there the rule is settled by statute, and the justice is required to "wait one hour after the time specified for the return" "unless the parties shall appear sooner." This, of course, gives equal indulgence.—*2 R. S. 1830, p. 233, § 46.*

Shufelt v. Cramer, 20 J. R., 309, cited by defendant's counsel, and which was prior to the statute, contained a *dictum* that the justice was then bound to wait an hour for the parties, or rather a reasonable time. That was not

SMITH v. BROWN.

the point decided, however, and it was not one which the case involved. There the justice had waited an hour for the plaintiff and had then entered judgment of non-suit against him. He sought reversal of the judgment by *certiorari* on the ground that he was entitled to greater indulgence than had been given him, but the court thought he had no cause to complain, and affirmed the judgment.

The only question was, whether, in the absence of any statutory regulation about it, the plaintiff could claim that the non-suit entered after waiting an hour was prematurely entered, and the court decided he could not. Granting, however, but not deciding, that regularly the justice ought to wait an hour for the defendant to appear, still his omission to do so, if shown or assumed, could at most amount to error.

It would not be a fault affecting jurisdiction, and hence not one subject to be taken advantage of collaterally.

The second objection has nothing to support it except that in the sheriff's deed there were no express words that the lots were in the county of Genesee, and state of Michigan. There is no force in this. The description is not ambiguous on its face. It purports to denote the parcels in dispute, and by their proceedings both parties have conceded that it applies to them. There is no ground whatever for saying that the premises pointed out by the deed are not identical with those referred to in the bill and answer and other proceedings. The point is not worthy of serious comment.—See *Russell v. Swezey*, 22 Mich., 235, and cases; *Noonan v. Lee*, 2 Black, 499; *Deery v. Cray*, 10 Wall., 263; *McChesney's Lessee v. Wainright*, 5 Ohio (Hammond), 452.

The last objection is more important. Looking at the shifts which were made between these parties and the indications afforded by the open facts, the inference would be that there was a design to screen the land from complainant's claim, and if this was not the case and the transaction was fair and honest, it was in Brown's power to afford

SMITH v. BROWN.

explanations by answer and evidence, not only harmonious, but convincing on the question of good faith. And his situation required this of him. Self-contradictions, vague and partial explanations from witnesses not likely to be well informed, failure to call others presumably acquainted with controlling circumstances, destruction of letters connected with the controversy, and inability, real or feigned, to reveal their contents, are incidents inconsistent with a claim of good faith. And we have all these in the defense. The answer sets up that Mrs. Brown held his note for one thousand dollars, and that it was agreed between them that he should deed this land to her for this note; that she resided at Fenton and he at Decatur, and that in virtue of this agreement he sent the deed to her to be accepted on condition of her sending back the note. The answer thus separates the parties at this juncture in order to strengthen the position that the deed was not actually delivered at all, but was sent, and that the act of sending was so qualified as to hinder it from eventuating in delivery as a conveyance. It is then claimed that she did not return the note and that the transaction was canceled by her return of the deed, and that the deed from Mrs. Brown to him, the last of December, was given and received to make the withdrawal from the agreement to deed the land for the note final and complete.

Now, when on the stand as a witness, Brown testified positively that his wife was present at Decatur when the deed of October 2d was prepared, and that he did not send it to her at Fenton, but passed it directly into her hands at Field's office. Again, the bill against him for a divorce from bed and board insisted upon an ample allowance, and when he came to make answer on the 30th of November, being nearly two months after his deed to his wife, he set up as defense against an allowance, that by the deed in question he had conveyed to his wife the lots described in it and now in dispute. Moreover, this conveyance is there represented as made by way of separate provision and in addition to the note, and there is no hint that it was

SMITH v. BROWN.

intended to satisfy the note or to be in lieu of it. And, finally, it appears from his own testimony that this personal obligation was actually surrendered to him a few weeks later without any consideration therefor and was thereupon destroyed. It is scarcely needful to refer to all the repugnant colorings and all the inconsistencies which appear in the attempt to state and substantiate a theory favorable to the good faith of the transaction.

His personal explanations, when compared with each other and with conceded facts, do not conciliate confidence, and the circumstance that letters between himself and wife, and which he gives reason to suppose contained material evidence, were destroyed or suppressed, and his assumed inability to recollect any of the contents, or even the substance, must necessarily weigh against him.

He called his son and one of his daughters, but their testimony was vague and indecisive.

There is nothing to make it probable that they were in a situation to know any thing concerning the real cause for the return of the first deed, and for the conveyance by their mother.

Mrs. Brown, however, must have had full knowledge, and Field most likely knew something, and yet he called neither of these persons. They were competent, but no reason is even insinuated for not producing them. The inference is forced upon the mind that the omission was not an inadvertence, but was designed, and that the ground of their not being called was an understanding that the state of facts to which they could depose, and would undoubtedly reveal, would be detrimental to the claim of good faith set up by Brown, and sought to be made out by his testimony and the recollection of his son and daughter of remarks made in their presence by the father and mother. On the whole, the scheme of the defense as drawn in the answer, and the course of the defense and the facts closely connected with it, the situation and relations of the parties, the contradictory accounts, the destruction of letters, the

SMITH v. BROWN.

claim of inability to give their contents or the substance, the vagueness of Brown's testimony in regard to the times of getting back the deed he gave, and of receiving the deed made by his wife, and in regard to several other incidents, naturally and inevitably lead to an opinion that the transaction assailed by the bill is not open to explanation as a fair and upright one, and that in truth the real purpose was to screen the land from complainant's debt. Consequently the last objection to the decree cannot prevail, and the result is, that the determination below must be affirmed, with costs.

The other Justices concurred.

The Attorney General on the relation of The Muskegon Booming Company v. The Ewart Booming Company.

Equity jurisprudence: Information: Public grievance. An information in equity at the instance of the attorney general must necessarily be based upon a public grievance.

Purprestures: Nuisances. A purpresture may be defined as an enclosure by a private party of a part of that which belongs to and ought to be open and free to the enjoyment of the public at large; but a purpresture is not necessarily a public nuisance. A public nuisance must be something which subjects the public to some degree of inconvenience or annoyance; but a purpresture may exist without putting the public to any inconvenience whatever.

Navigable streams: Soil under the stream: Riparian owner. The public has no proprietorship in the soil under small streams which are navigable only in a modified sense for floatage of logs and lumber, as it has under navigable waters at the common law, where the tide ebbs and flows; but the riparian owner presumably owns to the center of the stream.

Highways: Floatage. There is a plain distinction between the highway by land, with its definite limits to which the public right extends whether the whole is used or not, and the highway for floatage in small streams, where the public rights have no definite limitations of space except as practicability for use and the occasion for use may give variable limits as the seasons and the needs of business and traffic may change.

ATTORNEY GENERAL *v.* EVART BOOMING CO.

Bed of streams: Private appropriation: Purpresture: Nuisance. The private appropriation of a part of the bed of a small stream not navigable except for floatage, is neither a purpresture nor a nuisance, nor a public grievance of any sort, unless the public use is thereby unreasonably abridged or inconvenienced.

Booming companies: Bed of stream: Reasonable appropriation: Nuisance. Some appropriation of the bed of the stream being essential to the reasonable operation of booming companies, the public, in authorizing by general law the organization of such companies and regulating their operation, must be deemed to have waived its right to complain of an appropriation which is not unreasonable; nothing can be a nuisance which the sovereign authority allows, especially when the allowance is on public grounds, and made to facilitate the use of that which is common to all.

Competing booming companies: Inconvenience: Public nuisance. The question of lawfulness in the action of a booming company in enclosing part of the stream for its own purposes, is one depending on the particular facts: whether the general public desiring to avail themselves of the navigable rights are more inconvenienced than accommodated thereby; and inconvenience to another booming company occupying the same stream cannot be made the test of whether such action constitutes a public nuisance.

Common use of a common right: Reasonable use: Incidental inconvenience. Any injury resulting to one making use of a common right from the reasonable and prudent use by another of the like right must be considered incidental to and inseparable from the exercise of a general right, and is not the subject of either public or private complaint.

Reckless or careless exercise of general public right: Private injury: State interest. A careless or reckless exercise by one party of a public and general right, to the prejudice of another desiring to make use of the same right, and not affecting the general public, is a private injury and not a public wrong, and will not sustain an information on behalf of the state.

Equity pleading and practice: Information: Bill: Complainant: Relator. A pleading filed as an information, though having many of the features of a bill, cannot be sustained as a bill when dismissed as an information; the attorney general, falling by his information to make out a case on behalf of the public, cannot bring the relator forward as orator at the hearing; and there can be no bill of complaint without a complainant.

Heard June 14. Decided October 10.

Appeal in Chancery from Osceola Circuit.

Andrew J. Smith, Attorney General, and *Hughes, O'Brien & Smiley*, for informant and complainant, argued that the jurisdiction of courts of equity in cases of purpresture and nuisance, though not very frequently exercised, is undisputed: *Waterman's Eden on Inj.*, ch. 11, p. 259; *Attorney General v. Cohoes*, 6 Paige, 133; *High on Inj.*, § 519; 2 Story Eq., § 924; *Angell on W. C.*, § 565;

ATTORNEY GENERAL v. EVART BOOMING CO.

Attorney General v. Forbes, 2 M. & C., 123; that in cases of public nuisances an information will lie in equity to stop the mischief and restrain the continuance of it: *Mayor, etc., v. Balt.*, 5 Ves., 129; *Attorney General v. Nichol*, 16 Ves., 342; that the Muskegon river is a public highway: *Moore v. Sanborn*, 2 Mich., 519; *Lorman v. Benson*, 8 Mich., 18; *Thunder Bay River Booming Co. v. Speechly*, 31 Mich., 336; that at common law any encroachment upon a public stream was a purpresture, and an obstruction on a public river is a nuisance, and may be dealt with as such: *Weld v. Hornby*, 7 East, 195; *O'Fallon v. Daggot*, 4 Mo., 343; *Hunt v. Mayor*, 3 Paige, 213; *Mohawk Bridge Co. v. U. & S. R. R. Co.*, 6 Paige, 554; that the right of the public in a highway extends to every part of it: *Rex v. Russell*, 6 East, 527; *Rex v. Morris*, 1 B. & A., 441; *Shaw v. Crawford*, 10 Johns., 256; *Hart v. Mayor, etc.*, 9 Wend., 571; *Reg. v. Randall*, 41 Eng. C. L., 272; that in cases of public nuisances the suit should be by the attorney general, or at all events he should be a party to it, unless the individual injury is distinct from that which is done to the public at large, in which case alone have the persons injured a special right entitling them to recover: *Attorney General v. Johnson*, 1 Wils. Ch., 87; *Bains v. Baker, Amb.*, 158; *Attorney General v. Cleaver*, 18 Ves., 211; *Spencer v. L. B. R. R. Co.*, 18 Sim., 103; *Sampson v. Smith, Ib.*, 272; *Attorney General v. May*, 5 Cush., 336; *People v. Vanderbilt*, 28 N. Y., 396; S. C., 38 Barb., 282; *Davis v. Mayor*, 4 Kern., 526; *People v. St. Louis*, 5 Gilm., 351; 38 Cal., 564; *Milhan v. Sharp*, 17 Barb., 445; *Clark v. Saybrook*, 21 Conn., 313, and cases cited above; see also 2 Lans., 396; that when the relator has an interest in the matter his personal complaint may be joined with that of the government and the two together constitute an information and bill: *Story Eq. Pl.*, § 8, note 5; that the statute authorizing the organization of boom companies

ATTORNEY GENERAL V. EVART BOOMING CO.

does not give them any right to destroy navigation, injure property or otherwise create any nuisance: *Comp. L. 1871*, § 2788; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich., 308; that the attorney general has authority to file a bill to restrain by injunction any corporation from assuming or exercising any franchise, liberty or privilege, or transacting any business not authorized by its charter: *Comp. L. 1871*, § 6560.

W. L. Webber, for respondent, argued that the bill or information, whichever it may be found to be, does not state a case of equitable cognizance; that the attorney general has no authority to intervene in a case of this character; that the constitution (*Art. 8*, § 1) provides for his election and that he shall perform such duties as may be prescribed by law, thereby excluding all duties not expressly prescribed, and the statutes define his duties: *Comp. L. 1871*, §§ 255-7, 5718, and *ch. 225*; but no where is authority given him, or the duty imposed on him, to file an information on a state of facts like those here set out; that where a suit in equity is instituted on behalf of the government or of those who partake of its prerogative or whose rights are under its peculiar protection, the matter of complaint is set out by way of information, and where no other interest is involved, the proceeding is purely by way of information: *Story Eq. Pl.*, § 8; and as to the proper powers and duties of the relator and of the attorney general, see 26 Mich., 444; that in this case there is no feature which justifies the interference of the attorney general: it is no where alleged that the respondent has constructed its booms without legal right, but the burden of the complaint is, that in the exercise of its legal rights, respondent does not use such diligence as it ought, and that the manner in which it uses its structure, legally erected for a legal purpose, is objectionable; and this is not a matter calling for the exercise of equity jurisdiction, but the

ATTORNEY GENERAL V. EVART BOOMING CO.

remedy is by *mandamus*, or if not of public interest, then by an action at law for damages.

The respondent has the same right to maintain its boom at Evart that the relator has to maintain its boom at the mouth of the river, both being organized under the same statute; and the state is not interested in the want of diligence charged upon respondent in the exercise of its franchises, nor in an accounting as to the number of dollars that will make good the damages which the relator has sustained; and it is indispensable that the pleading state a case within the proper jurisdiction of a court of equity: *Story Eq. Pl.*, § 10; and failing of this, the error is fatal in every stage of the case, and cannot be waived or cured by consent.

The attorney general and the relator have no interest here in common; the former has no interest in the accounting, and the latter none in the exercise of the preventive powers of the court in behalf of the public; an information in equity in cases of purpresture is for the purpose of obtaining the preventive powers of the court by way of injunction, to afford a more speedy remedy than that by way of indictment, and the remedy by *mandamus* on behalf of the public, or of individuals whose rights are invaded, is a more speedy and effectual one than that by bill in equity.

It does not appear from the pleading that the relator has any interest beyond the running season of 1875; nor is it alleged that it contracted to run the logs of whose detention it complains at any specified time, and if it is to have compensation according to the labor bestowed, the damage from delays or increased expense is one that will fall, not on relator, but on the log owners, and it does not appear that they complain; nor does it appear that respondent has interposed any permanent obstruction to the stream, and a boom company cannot be operated without encroaching upon the stream somewhat, and the right given by statute to operate these companies must

ATTORNEY GENERAL V. EVART BOOMING CO.

be construed so as to have some value; where a large quantity of logs are floating down it is impossible to assort them and select out such as are to stop at the boom except by stopping the whole drive; and while this must necessarily to some extent delay the passage of logs down the stream, it is but an inconvenience incident to that mode of navigation, and gives no right of action so long as the stoppage is not unreasonable.

The bill alleges no injury to any person except the relator; it does not anywhere assert that any other person is interested in navigating said stream, or has sustained any injury.

If we are to judge of this instrument, not from its formal commencement, nor by the name endorsed upon it, we must call it a bill filed by the Muskegon Booming Company to enjoin the respondent from the exercise of any franchises whatever under the act above mentioned.

The prayer for an injunction in behalf of "your orator," if granted, would absolutely prevent the respondent from exercising any franchise whatever, and would make necessary the removal of all booms from the river. The question in fact is, whether the Muskegon Booming Company has an exclusive right to the navigation of the Muskegon river, or whether other people, who are interested at other points upon the river above the mouth, have not the same right that the relator exercises and claims for itself, and whether a court of equity will decree such exclusive right to the relator and enjoin all others from having any beneficial use of the navigation of said stream.

COOLEY, CH. J:

The pleading of the attorney general in this case is somewhat anomalous, and we deem it important to a proper presentation of our views that a very full statement of its substance should be given.

It begins by saying that, "Informing showeth unto your

ATTORNEY GENERAL V. EVART BOOMING CO.

honorable court, Andrew J. Smith, attorney general of the state of Michigan, by and upon the relation of the Muskegon Booming Company," that it is the business of said company to run, raft and boom logs in and upon the Muskegon river, which is a stream navigable for running, rafting, driving and floating logs, lumber and timber, and for a part of the distance navigable for steamboats, in which business it has been engaged for eight years or more, and is engaged the present season, that is to say, the spring and summer of 1875; that during the spring of the present season said company took possession of the logs and drive on said river, by and with the consent and at the request of the owners of logs therein and thereon, and by and with such consent has been running such logs; that there is a large quantity of logs so taken possession of and driven, to-wit: about two hundred million feet, and that by taking possession thereof they have entered into contracts with the owners to run, drive and raft the same to points below on the river where they are to be manufactured;

That by law said company has a lien on the logs for the payment for its services in so running, driving and rafting, and also in booming the same, and that the owners of the logs cut and placed them in the river for the purpose of running and driving the same, or of having the said company run, drive and raft the same to the city of Muskegon for manufacture into timber and lumber.

The information then proceeds to aver that "your orator" further informing shows that at a point in said Muskegon river, about two miles above the village of Evart, the said Evart Booming Company have made, erected and placed in said river booms, sticks, piers and piles; that at a point in said river about one mile below said village of Evart the said Evart Booming Company have made, erected and placed in said river dams and large numbers of sticks, piers and piles; that the channel of said river at the point where said booms are so made and erected is about the width of three hundred feet; that the said Evart Booming Company have

ATTORNEY GENERAL V. EVART BOOMING CO.

filled up the channel of said river with logs, booms, piers, piles and timber from the aforesaid point in said river, about two miles above said village of Evart, where the lower end of said boom is, extending up the channel of said river about the distance of half a mile, leaving open for the said distance of the channel of said river a place or channel only about eighteen or twenty feet in width; that for the distance of about half a mile aforesaid along the channel of said river the said Evart Booming Company maintain their booms on each side of the center of said river; that they have standing in said booms large quantities of logs and timber nearly or quite covering the surface of the water of said river; that of the surface left uncovered there is a very narrow space, only about eighteen or twenty feet in width; that all the rest of the surface and channel of said river, except the said eighteen or twenty feet in width at or near the center of said stream, and between the booms of the said Evart Booming Company, is filled with logs and timber and entirely filled and obstructed; that at the head of the boom said Evart Booming Company have, during a great portion of the time, booms and boom sticks extended entirely across the channel of said river, filling and obstructing the said channel, hereinbefore mentioned as being eighteen or twenty feet wide, as well as the rest of the channel of said river, and closing it to navigation for logs, lumber, timber and all floatables;

That "your orator" shows that the operations aforesaid of the said Evart Booming Company, carried on and conducted in the manner in which they are carrying them on and conducting them, obstruct, hinder, impede and delay the navigation of said Muskegon river at the point where the said river passes through the village of Evart, and that the said Muskegon Booming Company, in running, rafting and driving logs aforesaid, are greatly hindered and delayed in the navigation of said river; that they are put to great trouble and large expense in running their logs by and through said village of Evart, and "your orator" alleges

ATTORNEY GENERAL V. EVART BOOMING CO.

that the said obstructions of navigation constitute a nuisance and a purpresture;

That about the 11th day of June, 1875, the said Muskegon Booming Company had in the drive in said river, at or near the said village of Evart, above the booms of said Evart Booming Company, about seventy-five million feet of saw-logs; that the said company was then engaged in driving said logs in and upon said river to the city of Muskegon; that the said Evart Booming Company stopped and detained the said logs by and above said booms and dams; that by their said operations in said river they caused the water in said river to set back and above the natural channel thereof, and to throw the said logs in charge of said Muskegon Booming Company back and upon the land above and beyond the natural channel of said Muskegon river; that they have held the said logs there, or large quantities of them, for a long period of time, to wit: for several days, and would not let them pass through said booms and dams, and that in consequence thereof the said logs were thrown back and out of the channel of said river, and the said Muskegon Booming Company was obliged and compelled to employ and keep at work large numbers of men to sack off and roll into said river and the waters thereof, the said logs and timbers so as aforesaid floated and set back upon the land by the operations of the said Evart Booming Company; and by means thereof the said Muskegon Booming Company sustained great and irreparable damage and injury.

The information then proceeds to set out with more particularity the injuries which the relator suffers from the wrongful acts of the respondent, and which it will suffer if those wrongful acts are persisted in, and to negative the pretenses under which the action of the respondent is attempted to be justified.

It avers that the Evart Booming Company have not the necessary and usual facilities at their booms, or at the head of their dams, for assorting the logs that float down the

ATTORNEY GENERAL V. EVART BOOMING CO.

said river, and that they are and have been negligent and unskillful in erecting and maintaining, and in acquiring and owning the necessary and usual facilities for booming and assorting logs in and upon said river at the village of Evert aforesaid; and the other booms and facilities for booming and assorting logs on said river are entirely inadequate for the wants and necessities of booming operations at said point, and they fall greatly short of the facilities and means that might be had in and upon said river by using reasonable diligence, skill and care in erecting booms and assorting places on said river.

“And further informing, your orator shows,” that the said Evert Booming Company only works at the assorting places which they have at their booms on said river for ten or eleven hours during the twenty-four hours of the day, and that then they do not employ the necessary number of men to work with such expedition as the business of said river and the necessity of the occasion require; that the said stoppage, delay and detention by the said Evert Booming Company is entirely unreasonable and unnecessary, and without authority of law; that it occasions constantly recurring grievances to said Muskegon Booming Company and other persons navigating, and desiring to navigate said river, and that it is a public nuisance.

The pleading then avers requests to the Evert Booming Company to desist from its unlawful acts, which it refuses to heed, and it prays that said last mentioned company “may be restrained and enjoined from in any way or manner obstructing the navigation of the Muskegon river at or near the village of Evert, and from hindering, delaying, stopping or interfering with the floating, running, rafting or driving of logs in the said Muskegon river, and from detaining at Evert, or at any other point in said river, the logs being run, rafted, floated or driven by the said Muskegon Booming Company, and from in any way hindering by their booms or otherwise the free navigation of said river by logs, timber and lumber; and that the said Evert Booming

ATTORNEY GENERAL V. EVART BOOMING CO.

Company may come to a fair accounting with the said Muskegon Booming Company respecting the damages already sustained and to be sustained by their acts already committed by the Muskegon Booming Company by reason of the said Evart Booming Company stopping, hindering, delaying, or interfering with the navigation of said Muskegon river for running, rafting, driving or floating logs therein, and interfering with, stopping and delaying the logs floated and being floated, rafted and run in said Muskegon river by the Muskegon Booming Company, or that the said complainant and the Muskegon Booming Company may have such other relief or such further relief in the premises as may be agreeable to equity and good conscience."

We have said that this pleading is anomalous. It is certainly not artistic in form, and reads as if it might originally have been prepared as a bill on behalf of the Muskegon Booming Company, and afterwards, by slight alterations, converted into an information. The words "your orator" are so employed that it is not clear at all times whether they refer to the informant or to the relator, and while logically we must refer them to the informant, because he is the person addressing the court, the sense would seem to indicate that the relator was the party intended. But all matters of mere form may be overlooked if the substance of a legal complaint appears; and it is to that question that we shall direct our attention.

An information at the instance of the attorney general must necessarily be based upon a public grievance. If one is shown here, the information may be sustained; if not, it must, as an information, be dismissed. It is insisted that a public grievance is shown; that the acts which are complained of constitute a public nuisance and a purpresture, and that it has become the duty of the attorney general, acting on behalf of the state at large, to take proceedings for restraining persistence in this injurious conduct.

A purpresture may be defined as an enclosure by a private party of a part of that which belongs to and ought to be

ATTORNEY GENERAL V. EVART BOOMING CO.

open and free to the enjoyment of the public at large. The appropriation by an individual of a part of a public common may therefore be a purpresture, and as it would constitute an invasion of a public right, it would be proper that proceedings for its abatement should be taken on behalf of the state. An unauthorized enclosure of a part of a highway may also be a purpresture and a public wrong, whether the highway be one by land or by water.

It is, however, to be observed of a purpresture that it is not necessarily a public nuisance. A public nuisance must be something which subjects the public to some degree of inconvenience or annoyance; but a purpresture may exist without putting the public to any inconvenience whatever. Such might be the case where the part of a common highway is enclosed, provided the appropriation is confined to a part never made use of for purposes to which the highway is devoted. A highway usually includes within its limits more than is ever made use of for public purposes; but as it is set apart for public use provided there shall be occasion, the appropriation by an individual is unlawful, though it occasion no present inconvenience to any one, and it may be abated because the result of its being persisted in might be to obscure and possibly in the end to defeat the public right altogether, and thus preclude enjoyment by the public in case the use of that which was enclosed should ever be needed for highway purposes.

On the other hand, the appropriation of a part of that which belongs to the public may sometimes not be unlawful, not only because it may be made under circumstances raising an implication of assent on the part of the public authorities, but because it may be essential to the proper enjoyment of the public right. Such a case may be found in the extension of a wharf into navigable waters. Wharves are essential; and while the state may limit their construction to the line of navigability, this is seldom done except under very peculiar circumstances.

We shall assume in this case that the information makes

ATTORNEY GENERAL v. EVART BOOMING CO.

out a plain case of appropriation by the respondents of a part of the bed of the Muskegon river to their own purposes. The questions then are, *first*, whether the appropriation is of something which is common to the public; and if so, then, *second*, whether it is made in a manner or under circumstances which justify or excuse it. In considering these questions it is important that we bear in mind the sort of navigable water we are dealing with. Navigable waters at the common law are those where the tide ebbs and flows; under these the public have a proprietorship in the soil itself; and in various ways the sovereign authority may make use of this ownership for the benefit and protection of navigable rights as well as for other purposes. The Muskegon river, it need hardly be said, is not of this character, and the public have no rights whatever in the soil under it. Neither is it a navigable stream, at least at the point where the alleged purpresture exists, in the more popular sense of that term, for it is only a small stream whose value to the public consists in the use which can be made of it for the purpose of floating logs and lumber. The right of floatage is unquestionably a right which the state should guard and protect; but it is a serious mistake to assume that the private appropriation of a part of the bed of the river would necessarily be either a purpresture or a nuisance. The property taken in such a case is not public but private property, and the owner of the bank, who also presumably owns to the center of the stream, may maintain trespass or ejectment against the taker. If the owner make no complaint, the public can have neither right nor occasion for any, provided the navigable rights are not abridged. If they are, it is not very manifest how this can be a purpresture. The difference between the highway by land, with its definite limits to which the public right extends, whether the whole is used or not, and the highway for floatage in our small streams, where the public rights have no definite limitations of space except as practicability for use and the occasion for use may give variable limits, as the seasons and

ATTORNEY GENERAL v. EVART BOOMING CO.

the needs of business and traffic may change, is so plain that the difference between an appropriation in the two cases needs only to be mentioned. It requires neither argument nor illustration. The one is a public grievance of some sort; but the other is no public grievance of any sort, unless the public use is unreasonably abridged or inconvenienced.

But if the appropriation of a part of such a stream were presumptively a public injury, the public must be deemed to have waived its right to complain, so far as the appropriation was not unreasonable, when the law permitting the organization of booming companies, and regulating their operations, was enacted. This is so because some appropriation is essential to their operations. Nothing can be a nuisance which the sovereign authority allows, especially when the allowance is on public grounds, and made to facilitate the use of that which is common to all. The question of lawfulness in the action of a booming company in enclosing part of the stream for its own purposes, whether it is done by permanent structures or otherwise, must therefore necessarily be a question depending on the particular facts; it is a question of nuisance or no nuisance; in other words, it is a question whether the general public desiring to avail themselves of the navigable rights are or are not more inconvenienced than accommodated thereby. If they are not, the enclosure is not unlawful; if they are, it may be.

The information certainly makes out a case of inconvenience and injury to the relator, but it does not follow that a public nuisance is shown. It is perhaps impossible that two booming companies should make the same part of a stream the field for their respective operations without subjecting each other to more or less annoyance, impeding somewhat each other's operations and abridging each other's receipts. But like common carriers on the same route,—which in a certain sense they are,—they must put up with these inconveniences so far as they are not reasonably to be

ATTORNEY GENERAL V. EVART BOOMING CO.

avoided; they constitute no nuisance, and neither party conducting its business in a proper and prudent manner can be subject to either public or private complaint. Any injury under such management must be considered incidental to and inseparable from the exercise of a general right.

But if the respondent fails to keep within the limits of a just exercise of its rights, the case may still be one of purely individual injury. If one stops another in the street, but permits all others to pass along, there is private wrong, but no public wrong. The fact of its being committed in a public place does not make it public. We cannot read the information before us without being impressed that the complaint is of a private injury to this relator; of carelessness or recklessness in the exercise of a public and general right to its prejudice. Others are referred to as being inconvenienced, but the inconvenience to them appears to have reference to their transactions, actual, contemplated, or possible, with the relator, and to constitute a grievance on its behalf rather than on theirs. They may or may not care to complain, and until they do the attorney general may well leave them to deal with the case as they may desire or as they may be advised. As the case stands on the information the state at large can have no more interest in any individual grievance of this nature than in many others that are from day to day being called to our attention, and in which confessedly there is a public interest in no legal sense whatsoever.

It is insisted, however, on behalf of the relator that the pleading is both an information and a bill; and that though we conclude it should be dismissed as an information, it may still be sustained in the other character. But the fact is not as is claimed. There is no bill here; nothing but an information. It is undoubtedly informal, but we cannot treat that as both an information and a bill which on its face purports to be an information only. There can be no bill of complaint without a complainant; and the fact that the attorney general, appearing as the sole party addressing

ATTORNEY GENERAL V. EVART BOOMING CO.

the court, fails to make out a case on behalf of the public, cannot entitle him to bring the relator forward as orator at the hearing. When the information is dismissed there is nothing to support a decree in favor of any one. A reference to cases like *Attorney General v. Mayor of Bristol*, 3 Madd. Ch., 164; *Attorney General v. Vivian*, 1 Russ., 226; *Attorney General v. Heelis*, 2 Sim. & Stu., 67; and *Attorney General v. Master, etc., of Catherine Hall, Jac.*, 381, in which the pleading was treated as both an information and a bill, will make plain the difference between those cases and the present in that regard.

We agree with the circuit judge that no case was made for the intervention of the public authorities. The information was therefore properly dismissed. The decree will be affirmed, with costs against the relator.

The other Justices concurred.

Benjamin Van Aken v. John T. Gleason and others.

Mortgages: Registry: Notice. The purchaser of a mortgage is held bound by such notice as the registry afforded of another mortgage of the same date, but subsequently recorded, of which his vendor had actual knowledge.

Mortgages: Simultaneous dates: Priority of acknowledgment: Notice. Where two mortgages bear even date, it cannot be claimed that the earlier acknowledgment of the one latest recorded would necessarily show it was intended or given as a first security.

Simultaneous mortgages: Foreclosure by advertisement: Marshalling assets. A foreclosure by advertisement of one of two mortgages of even date, and designed to be simultaneous, would not be effectual to settle the relative rights of the foreclosure purchaser and the holder of the other mortgage; and a bill in equity would be necessary to determine such rights and to marshal the assets; and to do this a sale is necessary unless one of the parties shall take up the other's mortgage.

Equity pleading and practice: Simultaneous mortgages: Foreclosure: Rateable application of proceeds. On a bill to determine and protect the rights of complainant under one of two mortgages of even date, which is framed on the theory of priority, but which sets out the facts sufficiently, the

VAN AKEN v. GLEASON.

court, having found the two mortgages to be in law simultaneous, under the general prayer granted a decree for a foreclosure and sale, and a ratable application of the proceeds on the two mortgages, in case there should be insufficient to pay both.

Heard June 15. Decided October 10.

Appeal in Chancery from Saginaw Circuit.

John J. Wheeler, for complainant.

Gaylord & Hanchett, for defendants.

CAMPBELL, J:

The bill in this cause was filed to determine and protect the rights of complainant under a mortgage dated April 7, 1868, made by defendant Emery and one Hart to defendant Gleason, on lot eight and the east half of lots two and three, in block eight, in the village of Chesaning, being property occupied as a hotel.

Some of the testimony is contradictory, and we are obliged to determine as well as we can which to credit.

Before April 7, 1868, Gleason was in possession of this property and of certain adjoining lots, numbers six and seven, and the remainder of two and three. He held a contract from Grasley for the purchase of lots three, six, seven, and eight, for the sum of three thousand five hundred dollars, of which all was paid but one thousand seven hundred and fifty dollars and interest, and this was due one-half the next August (1868), and the balance August 20, 1869. Nothing was in arrears. On the 7th of April, 1868, Hart & Emery purchased of Gleason lot eight and the east half of lots two and three, and it is assumed, although the deeds do not appear in the record, that conveyances were made to them. Although nothing was then due to Grasley, Gleason advanced to him the payment which would become due in the following August, and two mortgages were then made by Hart & Emery for the unpaid purchase money, one to Grasley for the installment due August 28, 1869, for eight hun-

VAN AKEN v. GLEASON.

dred and seventy-five dollars, and one to Gleason for eight hundred dollars due in two installments, five hundred dollars and interest April 1, 1870, and three hundred dollars and interest April 1, 1871.

The Grasley mortgage was foreclosed by advertisement in December, 1869, and the property was bid off by Grasley's agent, Mr. Goodell. Just before the redemption ran out, Gleason procured one Kenyon to redeem, and title was made to Kenyon by Goodell, immediately after the redemption expired, but in pursuance of an agreement made before. A few months thereafter, Gleason procured one Benjamin Hicks to advance to Kenyon the amount of his purchase and a bonus of fifty dollars for his trouble, less three hundred dollars which was allowed by Kenyon as previously due from him to Gleason. Thereupon Kenyon conveyed to Hicks, who gave Gleason a lease for five years, at three hundred dollars a year, of lot seven and the east half of lots two and three. This lease does not include lot eight, and does not account for the three hundred dollars advanced by Gleason towards the purchase money. Mr. Hicks was not sworn as a witness. Gleason claims this three hundred dollars was to apply as the first year's rent.

In March, 1869, Gleason & Emery were keeping the hotel, and complainant held a chattel mortgage on the furniture and personal property. To prevent the foreclosure of this mortgage, Gleason induced complainant to take the real estate mortgage given him by Hart & Emery, which, as we are satisfied from the proofs, was represented to complainant as a first and only mortgage. Complainant, after final default, foreclosed this, and bid it in on the foreclosure, before he obtained any knowledge of the Grasley mortgage.

The Gleason and Grasley mortgages are both dated on the same day. The Grasley mortgage was first acknowledged, and the Gleason mortgage first recorded.

Inasmuch as complainant when he purchased the Gleason mortgage had constructive notice by the record of the Grasley mortgage, of which Gleason was actually informed, we think such notice as the record gave him was binding. It

VAN AKEN v. GLEASON.

becomes important, therefore, to know what the record showed, as well as what were the actual facts.

The mortgages bearing even date, and the Gleason mortgage being first recorded, it can hardly be claimed that the earlier acknowledgment of the Grasley mortgage would necessarily show it was intended or given as a first security. It is not necessary, however, to examine into this question, because Mr. Grasley, who is disinterested, swears that there was no agreement concerning a preference, and Gleason's testimony to the contrary does not convince us. He has evidently been scheming to defraud complainant out of his security, and both his conduct and his testimony impress us unfavorably. Both mortgages are purchase-money mortgages, and the Gleason mortgage is for a future installment of his contract with Grasley, which he himself advanced at the time to Grasley, and for which it would not have been unlikely or unreasonable that his mortgage should be put on the same footing with Grasley's. We think, under all the facts in this case, that such is the probable understanding of the parties, fairly to be drawn from the circumstances.

If the mortgages were designed to be, and were made in law simultaneous, then it is manifest that foreclosures by advertisement would not be effectual to settle the relative rights of complainant and the purchasers under the Grasley mortgage, and a bill in equity is necessary to determine them and to marshal the assets. To do this, a sale is necessary, unless one of the parties shall take up the other's mortgage.

Although the bill is framed on the theory of priority, yet it contains enough to authorize the relief under the general prayer. The decree below must be reversed, with costs against Gleason and Hicks, and a decree entered for a foreclosure and sale, and a ratable application of the money on the two mortgages, in case it is not sufficient to pay both. The cause to be remanded to have such decree entered at the circuit.

The other Justices concurred.

SUPERVISORS OF HOUGHTON COUNTY V. REES.

The Supervisors of Houghton County v. Seth Rees and others.

Errors that do not prejudice. A refusal to submit the facts to the jury upon one branch of plaintiff's claim because of defects in the declaration is held not error of which the plaintiff can complain where it is made to appear by the record that there was a fatal gap in his evidence.

Tax law: County treasurer: Forwarding delinquent tax lists: Extensions: Time. The provision of the tax law (*Comp. L. 1871, § 1094*) requiring the county treasurer to forward by the first day of March to the auditor general certified lists of lands returned as delinquent for unpaid taxes, which the auditor general is authorized to receive at any time during the month of March, is manifestly intended to serve as a guide in matter of time only in the ordinary cases where no extension of time for the collection of taxes is granted; and the requirement as to time, if in any view mandatory, in case of no extension, does not touch cases where extensions are allowed; and in such cases the county treasurer is only required to forward such lists promptly on receiving the proper returns from the collectors.

County treasurers: Official bond: Forwarding delinquent tax lists: Returns by collectors. In an action to charge the county treasurer on his bond with failure of duty in not forwarding to the auditor general lists of delinquent tax lands, it is incumbent on the plaintiff to show, not merely that returns of such lands were in fact made by the collectors to the treasurer, and that no transcripts were received from him by the auditor general up to April 1st, but also that the transcripts were not forwarded within a reasonable time after actual return to the treasurer by the collectors.

Official duty: Presumptions: Neglect of duty. The law having made the action of the collectors a necessary preliminary to that of the county treasurer, due performance on their part will not be presumed, in the absence of evidence, in order to charge him with having failed to perform duly; the presumption of official regularity applies with equal force to each.

Submitted on briefs June 15. Decided October 10.

Error to Houghton Circuit.

T. M. Brady and C. I. Walker, for plaintiffs in error.

T. L. Chadbourne, Chandler & Grant and S. F. Seager, for defendants in error, relied mainly upon *Weimer v. Bunbury*, 30 Mich., 216.

• GRAVES, J:

Rees was elected treasurer of Houghton county for the

34 MICH.—61.

SUPERVISORS OF HOUGHTON COUNTY v. REES.

regular term of two years commencing January 1, 1871, and gave to plaintiffs the usual official bond with the other defendants as sureties in the penal sum of thirty thousand dollars. He entered upon the duties of the office at the beginning of the term and continued until the 25th of October, 1872, when the board of supervisors removed him. James B. Sturges was elected to fill the vacancy, and he entered about the 25th of November. Some time afterwards this suit was brought on the official bond so given by Rees, and the plaintiffs claimed, *first*, that he refused to account for and pay over money he had received for the county; and, *second*, that he had neglected to return lists to the auditor general of lands delinquent for taxes for 1870 and 1871.

The general issue was pleaded, and in November, 1875, the cause was tried before a jury.

The plaintiffs were allowed to adduce such evidence as they had in support of each of their claims, and the jury were permitted by the judge to pass upon the facts bearing on the first charge, and they found a verdict for the plaintiffs thereon. So far no question is raised. But he refused to submit the facts concerning the other charges and founded his refusal upon the indefiniteness and insufficiency of the declaration. The plaintiffs being dissatisfied, have sought a revision here. The portion of the declaration which the judge condemned is open to criticism, but as the defendants make the point that there was a fatal gap in the plaintiffs' evidence, it is best to consider that first, because if well taken it follows as matter of law that they were not entitled to a favorable finding on this part of their case, whether the declaration was good or bad, and hence were not wronged by the judge's ruling, and have no cause to complain. His exclusion of recovery by declining to submit the facts was no more injurious than a direction to find for the defendants would have been, and if the defendants are correct in their position, such a direction would have been proper. The inaccuracy of the ground of the ruling, if it was so, is

SUPERVISORS OF HOUGHTON COUNTY v. REES.

in this aspect of the case of no importance. The theory of the plaintiffs is, that it was Rees' official duty on receiving in due form and season lists of delinquent tax lands from the township treasurers to forward transcripts thereof in due form and lawful season to the auditor general; that the township treasurers did in fact seasonably and in proper form report to him such lists, but that he neglected to forward transcripts thereof to the auditor general and thereby became liable to the county for an amount equal to the taxes charged on such lands, less, however, the amount appearing to have been paid. The declaration stated no specific time or times at which the township treasurers made returns to Rees as county treasurer. It simply stated argumentatively that the returns were "properly and seasonably" made, and the charge of neglect to forward transcripts to the auditor general contained no reference to any specific time. It barely stated that Rees did not forward the transcript in the "spring" of the particular year, "nor at any other time."

In this attitude of the case, and considering the question, it is best to refer somewhat liberally to the statutes.

Taxes on real estate are declared to be a lien from the first Monday of December in the year of the assessment.—§ 1006, *C. L.* And in case no extension is given for collecting, the local collector is required to make returns to the county treasurer on or before the succeeding first day of February.—§ 1003. And if there is any unpaid tax on land the officer has not been able to collect of the owner or occupant, he is required to make a verified statement of the tax so unpaid and due, with a full and perfect description from the roll of the premises charged, and submit the same to the county treasurer, and thereupon the latter is required to compare such statement with the roll; and if found correct, to certify to it and file it with his certificate in his office. At the same time, the county treasurer is commanded to reject and charge back any lands twice assessed, or so erroneously or defectively described that they

SUPERVISORS OF HOUGHTON COUNTY V. REES.

cannot be ascertained. He is also to give the collector a receipt stating the amount of taxes returned unpaid, and also give him a statement of all taxes rejected.—§§ 1019, 1020, 1021, 1022.

On receipt of this verified statement from the collector, the county treasurer is required to enter the same in his official books, and make a correct transcript thereof, of all the descriptions of land returned as delinquent for unpaid taxes, except such as he shall have rejected, and which transcript is then required to be compared by the county clerk with the collector's statement as certified by the county treasurer, and if found true by the clerk, he is to append his certificate that he has so examined and compared it, and found it correct. Such transcript so made, compared and certified, the county treasurer is directed to forward to the auditor general by the first day of March next after the return of the statement, but it is declared to be receivable at any time during said month of March, and when received, the amount is to be credited to the county on the books of the auditor general's office.—§§ 1033, 1034. The section prescribing the time for sending forward this transcript, and which stands as section 1034 in the compilation, is numbered in the act itself as section sixty-eight. The preceding section, numbered as sixty-seven in the act, regulates the preparation and nature of the transcript.

This return being made to the auditor general, he is given extensive authority to make rejections. If before sale he discovers that for any reason returned lands should not be sold, it is made his duty to withhold them.—§ 1065. If he finds out that the tax has been paid to the township or county treasurer, or that the land was doubly assessed, or so erroneously or defectively described that it cannot be sold, or was not subject to taxation at the time of assessment, he is required to reject the claim that the lands are delinquent.—§ 1074. Particular provision is made for those cases where he rejects for the reason that the particular tax exceeded lawful limits.—§§ 1079, 1080, 1081.

SUPERVISORS OF HOUGHTON COUNTY V. REES.

We may next notice regulations for extending the time for returning lands as delinquent to the county treasurer. In the first place, the board of supervisors is empowered to allow extension to the first of April, or a month beyond the time prescribed in section sixty-eight (being § 1034 of the compilation) for forwarding transcripts to the auditor general, and including the whole time there authorized for his reception of them. In the second place, if the board of supervisors neglect to extend the time, then the township board, or common council of a city, may grant extension until the first day of March, or up to the very time for forwarding transcripts to the auditor general as before mentioned.—§ 1004. In case of extension by the township board or city council, the fact is to be certified to the county clerk; and in case of extension in that way, and also in case of extension by the board of supervisors, the county clerk is to certify to the action taken, and attach his "certificate to the transcript of the county treasurer, to be forwarded to the auditor general as required by section sixty-seven."—§§ 1004, 1005. As already suggested, section sixty-seven deals with the requisites of the transcript, and the circumstances of its preparation and some other matters, but does not touch the time for sending it to the auditor general or the period during which he may receive it. It is the succeeding section which directs it to be sent the first of March and allows it to be received at any time during that month. But this direction is manifestly intended as a guide where the act is allowed to operate without resort to the provisional regulations for extending the time for return to the county treasurer by the collector, and not in cases where the discretionary power to give time is exercised. The regulation harmonizes well enough with the other requirements when the statute is not caused to depart from its general mode of operation and to act exceptionally, but would be plainly inconsistent with the regulation conveying discretionary power to extend until April first the time for doing the very acts without which the transcript to be for-

SUPERVISORS OF HOUGHTON COUNTY V. REES.

warded March first could not be made at all. The passage which refers to section sixty-seven is very awkward. It will hardly do, however, to claim that the legislature meant to refer to section sixty-eight, and in referring to section sixty-seven committed a blunder. If the reference had actually expressed section sixty-eight, it must have resulted in great absurdity if adhered to in construction. It seems reasonable to infer that it was thought best to apply the same regulations concerning the preparation of transcripts for the auditor general to both classes of cases, and that section sixty-seven was purposely referred to in order to secure that object, and that it was not designed to apply to the exceptional class the directions in section sixty-eight which fix the first day of March for forwarding, and the end of that month as the limit for receiving transcripts. There is no other provision which suggests any specific day for forwarding or any specific month for receiving; and as the county treasurer cannot make out transcripts before returns to him by the local collectors, it must follow that when these returns are postponed by extensions the treasurer is not required to forward by the first day of March, or the auditor general's receptions limited to that month. Whether the requirement in section sixty-eight is in any view mandatory in case there is no extension, it does not touch cases where extensions are allowed, and it would seem to be a reasonable conclusion that in the latter class the county treasurer should forward promptly on receiving the proper returns from collectors.

In this way analogy would be kept up with the course marked out where there are no extensions, and unnecessary delay, which is especially objectionable in tax proceedings, would be avoided. But collectors may fail to return in season in each class of cases, and thereby prevent the county treasurer from forwarding in the one by the first of March, or in the other promptly after the end of the extension, since, as already stated, he cannot make the transcript until he receives the returns due from the collectors.

SUPERVISORS OF HOUGHTON COUNTY V. REES.

Now, the legislature could never have designed to require him to perform an act rendered impossible by the non-performance of acts they required the collectors to perform as a ground for his action, or to make him responsible for the consequences of their exclusive neglect. Even the requirement of section sixty-eight is necessarily subject to this consideration.

It would seem plain, therefore, that in an action to charge the treasurer on his bond with failure of duty in not forwarding to the auditor general lists of delinquent tax lands, it is incumbent on the plaintiffs to show, not merely that returns of such lands were in fact made by the collectors to the treasurer and that no transcripts were received from him by the auditor general up to April first, but at least that the further fact must be shown or appear, that the transcripts were not received by the auditor general up to some certain time within which they ought to have been received in view of the time of actual return by the collectors. So long as it does not appear at what time the collectors made return to the treasurer, it does not appear they were in such time as to require him, or even to enable him, to make and forward transcripts in season to be received on or before April first, and hence the facts do not show him in default.

We may now refer to the facts adduced. The plaintiffs gave evidence that the several township treasurers returned delinquent taxes upon lands to a large amount on account of assessments for the years 1870 and 1871 respectively, and they also gave in evidence certificates made by the deputy auditor general, that he had made diligent search for the transcripts made by the county treasurer for the county of Houghton of descriptions of lands returned to the auditor general's office as delinquent for unpaid taxes of said years, and was unable to find any as made by said treasurer and received at the auditor general's office prior to April first, 1871, for the taxes of 1870, and was likewise unable to find any as made by said treasurer and received at said

SUPERVISORS OF HOUGHTON COUNTY V. REES.

office prior to April first, 1872, for the taxes of 1871. No other evidence was given of failure by Rees to forward transcripts or of their non-reception at the auditor general's office. And the record states positively that no evidence was given to show at what time or times the township treasurers made their reports of delinquent tax lands to him. If these certificates from the auditor general's office are allowed as proof that transcripts were not received prior to April first, and also of the fact that they were not made in time to be received prior to April first, they cannot operate further and conduce to show failure to receive, or failure to make, later. For aught they can be claimed to prove, or tend to prove, the transcripts may have been made in season to be received and may have been received on or shortly after April first, and as they are shaped and worded they come very near suggesting an inference that transcripts were received after the end of March. At all events, as there was no proof of the time or times of the returns by the township treasurers to the county treasurer, there were no facts to show that the latter was in a situation to render it possible for him to make and forward transcripts in time to be received at the auditor general's office prior to April first, and hence there was a want of facts to prove him in default.

But it may be said that this omission of express evidence may be supplied by presumption, and that it should be intended that the township treasurers performed their duty, and consequently made their returns in time to enable the county treasurer to make and forward transcripts in season to be received at the auditor general's office prior to April first. Their duty in regard to the time of making returns is, as we have seen, not the same in all cases. There may be extensions even up to the first of April, and, as already stated, the requirement for forwarding lists by the county treasurer in season to be received before April first does not apply where the power to grant extensions is exercised. Passing this, however, we think the case cannot

SUPERVISORS OF HOUGHTON COUNTY v. REES.

receive aid through the presumption in question. There is as much reason for saying that Rees must be presumed to have performed his duty, and to have forwarded transcripts as soon as he had the necessary reports from below, as there is for saying the township treasurers must be presumed to have performed theirs, and to have made their returns to him seasonably. The law made their action a necessary preliminary to his, and it will not allow due performance on their part to be proved by naked presumption, in order to charge him with having failed to perform duly. The point is ruled in *Weimer v. Bunbury*, 30 Mich., 216.

The case is open to many observations concerning the averments necessary and proper in order to state a cause of action for such a delinquency as is mentioned, and concerning the evidence necessary and the measure of recovery. But there is no occasion to consider such matters now. Before leaving, it may not be amiss to say, that the defendants claimed, and gave evidence tending to show, that there were extensions in several of the townships for each year, and that in some instances they were up to March first. If such was the case, the fact was of some importance in reference to the mode of stating a cause of action, and in reference to the proof to be made.

It only remains to say, that the evidence was entirely wanting in respect to a fact which was essential to a right of action as to this branch of the case, and hence the ruling of the court, whatever view may be taken of the ground of it, was not injurious.

The judgment must be affirmed, with costs.

The other Justices concurred.

34 MICH.—62.

WATERMAN v. WATERMAN.

Solomon S. Waterman v. Joseph D. Waterman.

Practice in supreme court: Assignment of errors. A court of review will not consider on error any question not brought to the attention of the court below and not raised by any assignment of error.

Bill of particulars: Money loaned: United States bond loaned. It is not admissible, under a charge in a bill of particulars for money loaned to the defendant, to give in evidence the loan of a United States bond; such a charge can be supported only by proof of the loan of coin, bank bills, or some well known circulating medium, popularly known and designated as money.

Evidence: Money loaned: Pecuniary ability of plaintiff: Rebuttal. Where in defense to an action for money loaned an attempt is made to show that plaintiff could not have made the loans claimed because not of sufficient pecuniary ability, it is competent for the plaintiff in reply to show what means he had from which the loans could have been made.

Evidence: Money loaned to pay off mortgage: Declarations: Admissions. The plaintiff claiming, and defendant denying, that plaintiff had loaned defendant moneys with which to pay off a mortgage on his farm, evidence was held admissible to prove declarations and admissions by defendant that plaintiff had an interest in the farm.

Evidence: Money loaned with which to pay off incumbrances: Securities. In an action to recover for moneys claimed to have been loaned by the plaintiff to defendant with which the latter paid off certain incumbrances, the payment of which was conceded, the dispute being only as to who furnished the means, the refusal to receive in evidence the securities themselves, in connection with the testimony as to their payment, is held not error.

Heard June 16. Decided October 10.

Error to Kalamazoo Circuit.

Severens, Boudeman & Turner, for plaintiff in error, to the point that under the bill of particulars evidence of the loan by plaintiff to defendant of a United States bond was not admissible, cited: *Green's Prac.*, § 1042 and cases there cited; and upon the irrelevancy of the evidence as to the pecuniary ability of the plaintiff to have made the loans claimed, cited: *1 Greenl. on Ev.*, § 52; *Hilton v. Scarborough*, 5 Gray, 422; *Wheeler v. Packer*, 4 Conn., 102; *State v. Penly*, 27 Conn., 587.

Arthur Brown, for defendant in error.

WATERMAN v. WATERMAN.

MARSTON, J:

This was an action of assumpsit, brought by Joseph D. Waterman against his father, for money loaned to him, money paid for his use and benefit, money received by defendant for plaintiff, United States bonds loaned to defendant, for the value of certain personal property, and for one-half the proceeds and one-half the value of a certain livery barn.

The first and most important question relied upon by plaintiff in error in this court was, that from the relationship of the parties the law would not imply a promise to pay, and their conduct and treatment of each other shows that no undertaking for payment was either given or relied upon, therefore upon any view of the facts plaintiff was not entitled to recover.

It nowhere appears that this question was raised on the the trial in the court below, nor is there any assignment of error raising any such question in this court. The bill of exceptions very properly does not set forth all the evidence given on the trial, so that upon this point there is nothing for this court to consider.

Upon the trial, plaintiff testified that he at one time let defendant have a two hundred dollar bond. This was objected to because no such claim was set forth in plaintiff's bill of particulars. There are several items in the bill of particulars of money loaned to the defendant, under which it is claimed this evidence was admissible. It is undoubtedly true, as claimed, that the object of a bill of particulars is to apprise the other party of the nature of the items upon which the plaintiff relies; but it does not follow that an item for money loaned would fairly apprise the opposite party that evidence would be given under such claim that a bond had been loaned. Where the charge is for money loaned, a party would be expected to prepare to meet evidence tending to show that coin, bank bills, or any well known circulating medium, popularly known and designated

WATERMAN V. WATERMAN.

as money, had been loaned to him. We are not prepared to say, however, that under such a charge he would be prepared to show that he had not borrowed bonds, or other obligations of well known value, which might have been sold or negotiated by him and thus converted into money. If under a charge in plaintiff's bill of particulars of money loaned defendant, he could prove the loan of a United States bond, then we can discover no good reason why a state, county or city bond could not in like manner be proven; and if this could be done, then why not prove the loan of a railroad or individual bond, or even a promissory note. The mere fact that the United States or state bond might be worth one hundred cents on the dollar in market, could make no difference. The bond of an individual or a corporation might be of equal value, and if not, the defendant might be sought to be held for its market value. We are of opinion that under a charge for money loaned the defendant cannot be charged with the loan of bonds or other like obligations. In this case there is still another reason why the defendant should not be so held. The plaintiff in his bill of particulars recognized a distinction, as he charged the defendant with money loaned, and also with the loan of certain United States bonds. We think that in admitting this evidence the court erred.

It is next claimed that the court erred in permitting plaintiff to prove that he was worth a given sum, in order to furnish an inference that he let defendant have the moneys he claimed to recover for.

Standing alone such testimony would have no tendency whatever to show that money had been loaned to another; but when, as in this case, the defendant tries to show that the plaintiff could not have made the loans claimed because not of sufficient pecuniary ability, then, in answer to this, the plaintiff may show that he did have the means from which the loans could have been made. Where a plaintiff claims to have paid or loaned large sums of money at a certain time, a pretty effectual defense, we think, would be

WATERMAN v. WATERMAN.

made by showing that the plaintiff at and previous to the time alleged had no means whatever, and therefore could not have made the loan or payment as claimed. When such a defense is attempted, evidence of the plaintiff's pecuniary ability at the time referred to would fairly tend to destroy the defense thus set up, and for such a purpose would be admissible.

It is next claimed that the court erred in admitting proof offered by plaintiff to show admissions made by defendant that plaintiff had an interest in a certain farm, the title to which stood in defendant's name. This evidence was not offered for the purpose of showing a resulting trust in favor of plaintiff. The plaintiff made no such claim. He did claim, however, in his bill of particulars, and testified, that he had furnished defendant with money to enable him to pay off a mortgage upon this farm, and he offered these admissions as tending to corroborate his testimony in this respect. For this purpose we are of opinion that the admissions might properly be submitted to the consideration of the jury. Where such a claim is made, it is very difficult to exclude a conversation or admission made by either of the parties, otherwise admissible, relating to the matters in controversy. Expressions are frequently made by parties, which standing alone might have no bearing on the case or be unintelligible, but when taken in the light of all the surrounding circumstances, become as intelligible to, and are as well understood by a jury, as they were at the time by the parties themselves.—*Hill v. Chambers*, 30 Mich., 422.

It is next urged that the court erred in excluding the securities which were paid off by defendant, in connection with his own evidence that he had paid them. It does not appear that there was any dispute whatever between the parties in this case as to defendant's having in fact paid these securities. It was a part of the plaintiff's, as well as defendant's theory, that he (the defendant) had paid them; but where defendant obtained the money with which he made the payment, was the material question in controversy.

WATERMAN v. WATERMAN.

The introduction of the securities, for the purpose of showing that defendant had paid them, could by no possibility tend to show where he obtained the money he paid them with, and their payment in fact by him not being disputed, we cannot see that defendant was at all injured, or could be, by the ruling.

We do not consider the other questions raised, as they are not likely to come up again in the same shape upon a new trial. For the error already pointed out, the judgment must be reversed, with costs, and a new trial awarded.

The other Justices concurred.

Sarah A. Colgrove v. John J. Solomon.

Statute of frauds: Contracts for purchase of land: Agency: Authority. An agent whose authority rests in parol cannot bind his principal by an oral contract for the purchase of land.

Money had and received: Oral agreement to accept payment in land: Rescission. Where in defense to an action for money had and received an oral arrangement is set up to accept in payment a deed of land, which arrangement was afterwards repudiated when performance was tendered, rulings designed to make the case turn upon the rescission by the plaintiff of the alleged arrangement are inappropriate, the real basis of the plaintiff's action being the lack of any binding contract to accept payment in land.

Oral agreement to accept payment in land: Part performance: Payment of money: Preparatory acts. The payment in part in money of an existing debt, in pursuance of an arrangement to accept payment partly in money and partly in land held by a third person, and a discharge by the debtor of a mortgage he held against the land in question, cannot operate as a part performance of an oral contract to accept the land as payment, such as to take the case out of the statute of frauds; such part payment was but payment of so much of an existing debt, and the discharge of the mortgage was not a fact of part performance at all, but merely a preparatory act to put the vendor in condition to tender performance.

Deeds: Reservation of possession: Crops. One who has agreed to accept in payment of a specified debt a deed of lands, with a reservation of possession in the grantor until the following October, is not bound thereby to accept a deed containing the additional reservation of all crops

COLGROVE v. SOLOMON.

growing thereon or produced before October; the right to sever and remove crops is distinct in its nature from the temporary privilege of retaining possession, and is not essential thereto, but of larger import.

Heard June 30. Decided October 10.

Error to Kalamazoo Circuit.

- O. Tuthill and Arthur Brown, for plaintiff in error, to the point that it was not competent to set up in defense to the action a partly performed parol contract to receive payment in land, cited: *Browne Stat. Frauds*, § 451; *O'Herlihy v. Hedges*, 1 Sch. & Lef., 123; *Kelley v. Webster*, 12 C. B., 283; *Freeport v. Bartol*, 3 Greenl., 345; *Patterson v. Cunningham*, 2 Fairf., 512; *Norton v. Preston*, 15 Me., 16; *Newell v. Newell*, 13 Vt., 24; *Kidder v. Hunt*, 1 Pick., 331; *Thompson v. Gould*, 20 Pick., 338; *Adams v. Townsend*, 1 Met., 485; *Eaton v. Whittiker*, 18 Conn., 231; *Thomas v. Dickinson*, 14 Barb., 90; *Abbott v. Draper*, 4 Denio, 52; *Seymour v. Davis*, 2 Sand., 245; *Henderson v. Hayes*, 2 Watts, 148; *Sailors v. Gambril*, 1 Smith, Ind., 81; *Davis v. Moore*, 9 Rich. (S. C.), 215; *Pike v. Morey*, 32 Vt., 37; *Hunt v. Coe*, 15 Iowa, 197; 3 Pars. Con., 350; *Scott v. Bush*, 26 Mich., 420; *Cook v. Bell*, 18 Mich., 393; that the acts of part performance, to be sufficient, in equity even, to authorize the specific enforcement of a parol contract to purchase land, must be directly in prejudice of the party doing the act, and not ancillary or preparatory merely, nor such as can be compensated in damages: *Browne Stat. Frauds*, § 460; 3 Pars. Cont., 60; that what Solomon did in performance of the agreement was in no way to his prejudice beyond what an action for damages would fully remedy, and such mere preliminary negotiations and arrangements as conferred no rights and constituted in no sense a binding contract, at least without the subsequent assent of both parties: 26 Mich., 420; 10 Mich., 219; 11 Mich., 494; 14 Mich., 238; 20

COLGROVE v. SOLOMON.

Mich., 410; 38 *Penn.*, 147; that the doctrine of part performance is held in disfavor, and will not be extended: *German v. Machin*, 6 *Paige*, 288; that all attempts to make the rule of part performance operate at law the same as in equity have wholly failed: 3 *Pars. Cont.*, 59; *Davenport v. Mason*, 15 *Mass.*, 85; *Baldwin v. Palmer*, 10 *N. Y.*, 232; *Cagger v. Lansing*, 23 *N. Y.*, 550; *Day v. N. Y. C. R. R. Co.*, 51 *N. Y.*, 591; *Dung v. Parker*, 52 *N. Y.*, 497.

Severens, Boudeman & Turner, for defendant in error, argued that the discharge of the mortgage on the Alanson land by defendant was such a part performance on his part as took the case out of the statute of frauds and made the contract a valid one and binding upon the plaintiff; and to the point that any thing done under the contract which would render it impracticable to place the parties in *statu quo* is a sufficient part performance to take the case out of the statute, on the ground that to refuse performance would amount to a fraud, cited: *Adams Eq.*, 202, and cases cited; *Browne Stat. Frauds*, § 448; *Richmond v. Foote*, 3 *Lans.*, 244; *Lowry v. Tew*, 3 *Barb. Ch.*, 413; that defendant, having discharged the mortgage, could not be restored to his former position by rescission of the contract; that the plaintiff could not rescind the contract, even had defendant neglected to deliver any deed at the very time agreed upon, time not being an essential element of the contract; and that it is a well established rule that a contract cannot be rescinded by one party for the fault of the other, unless both can be placed in the same situation in which they stood previous to the contract: *Chance v. Comrs of Clay Co.*, 5 *Blackf. (Ind.)*, 441; *Calhoun v. Davis*, 2 *Ind.*, 532; *Peter v. Hunders*, 19 *Ind.*, 93; *McGunn v. Callman*, 18 *Ind.*, 128; *Moore v. Rare*, 1 *Iowa*, 198; *Griffith v. Ford Co. Bank*, 9 *Gill & J. (Md.)*, 142; *Brown v. Witter*, 10 *Ohio*, 142; *Barrett v. Stanton*,

COLGROVE v. SOLOMON.

2 Ala., 181; *Peters v. Roberts*, 6 Ala., 9-11; *Conner v. Henderson*, 15 Mass., 319; *Hammond v. Buckmaster*, 22 Vt., 375; 2 Pars. on Cont. (5th ed.), 678-9; *Burge v. Cedar Rapids, etc., R. R. Co.*, 32 Iowa, 101; *Jarrett v. Morton*, 44 Mo., 275; *Ellington v. King*, 49 Ill., 449; that plaintiff, if entitled to rescind, must notify defendant of his intention so to do before the latter performs his part of the contract: *Hooper v. Taylor*, 4 E. D. Smith, 486; *Carney v. Newberry*, 24 Ill., 203; *Mallin v. Bloomer*, 11 Iowa, 360; *Davis v. Downs*, 4 Mich., 350.

GRAVES, J:

Mrs. Colgrove brought her action for money had and received, to recover a sum she had paid Mr. Solomon as purchase money on a land trade which had been rescinded, and he was allowed to succeed before the jury under a defense grounded upon a subsequent agreement, and things done in connection with it, to repay her partly in cash and partly in land.

She now asks a review of the proceedings. A reference to the main circumstances is necessary. She agreed to buy of Solomon eighty acres of land for two thousand five hundred dollars, and on March 3, 1873, he deeded to her. She gave back certain securities and paid one thousand five hundred dollars in cash. She soon found cause to be dissatisfied with the title, and by mutual consent the trade was canceled. She reconveyed, but Solomon did not restore the money. He claimed that he could not then command it, and proposed to secure by mortgage the refunding of it. This proposal fell through. He then suggested as an expedient, to pay four hundred dollars in cash and the residue of eleven hundred dollars in a piece of land owned by one Mrs. Alanson. The parties were at Dr. Harrison's, and the negotiation and bargaining were entirely oral. The doctor seems to have been a trusted acquaintance of Mr.

COLGROVE V. SOLOMON.

Solomon and a friendly adviser of Mrs. Colgrove. Both parties seem to have looked somewhat to him to aid in bringing about an adjustment, and Mrs. Colgrove sought his help and advice more or less in the matter. His intervention appears to have been merely casual, and in the spirit of friendly accommodation only. He had no written power from either side.

The Alanson parcel was burdened with two mortgages, one belonging to Solomon, and one for five hundred dollars owned by a third party, and Solomon desired that possession of the land should be detained until the first of October following. The property itself was valued at sixteen hundred dollars subject to such detention, and at eleven hundred dollars subject both to such detention and the mortgage for five hundred dollars. It was therefore considered that the land burdened with this last mortgage, and with the right of possession in another until October, was equivalent to eleven hundred dollars. In this state of things it was orally agreed that Solomon should pay Mrs. Colgrove four hundred dollars in cash, and cause the Alansons to deed to her the parcel in question, subject to the mortgage for five hundred dollars, and with a reservation of possession until October.

Solomon paid the four hundred dollars in cash, and acknowledged satisfaction on the record of his mortgage on the Alanson property, and in a short time he forwarded to Doctor Harrison a deed made by the Alansons. This deed was attested by only one witness, and contained a reservation of possession until October, and a further one of all crops growing at the date of the deed and also of all crops produced before October. The doctor objected to the deed on the ground that it had but one witness, and pointed out some trifling inaccuracies besides, but said nothing about the reservation of the crops. He returned the deed and advised the making of a new one. This instrument was therefore not accepted by any body. Mrs. Colgrove presently decided that she would not carry out the verbal agreement and would

COLGROVE v. SOLOMON.

not take the Alanson land. She so wrote to Dr. Harrison. Following this, a second deed from the Alansons to Mrs. Colgrove was sent by Solomon to Dr. Harrison. This instrument contained the same reservation in regard to crops as the first. Doctor Harrison sent it to Mrs. Colgrove and she refused to accept it, and handed it to her attorney. The proof is clear and uncontradicted that she did not and would not accept it. If the court erred in permitting the defense tendered by Solomon to prevail, it is then evident that Mrs. Colgrove was entitled to recover the money remaining back. Indeed, this is not disputed.

We think that the main rulings of the circuit judge proceeded on mistaken views of the law applicable to the case, and were plainly erroneous and misleading. We shall not take up separately the various propositions stated and refused. We may observe, however, that, among other matters, he authorized the jury to imply from the evidence that Doctor Harrison was Mrs. Colgrove's lawful agent to convert without writing her verbal and invalid bargain into one valid and obligatory; and further, that he gave the jury to understand that in view of the bargain and her situation in relation to it, she would be bound by it unless there appeared a state of facts amounting to a rescission of it. Now, it is entirely clear that since her bargain was an oral one it was not binding upon her at all. And it is equally clear that the acts and sayings of Doctor Harrison were not superior in force to her own verbal proceedings. He had no written power and entered into no writing. If in any proper sense he was her representative to make or validate any contract, he was no more able without writing than she was in person to bring her into binding contract relations as vendee.

The rulings in respect to rescission were wholly inappropriate. The ground of Mrs. Colgrove's objection or answer to the defense was not that she had rescinded or attempted to rescind any contract for the Alanson land.

Her position was, that she had never entered into any

COLGROVE v. SOLOMON.

valid contract relations with Mr. Solomon for the purchase of that property. She insisted that her verbal bargain never became a contract, and that there was nothing to rescind, and in this she was correct.—*Scott v. Bush*, 26 Mich., 418; *S. C.*, 29 Mich., 523.

In support of the defense, it was ruled below, and is now urged, that the payment of the four hundred dollars by Solomon, and the discharge of his mortgage, were acts of part performance to preclude the setting up the statute of frauds in a court of equity, and that the same doctrine is legitimate in the equitable action for money had and received in a court of law. Whether the doctrine alluded to is or is not proper in such a case, is a point not material. The facts mentioned are not within it. The payment of the four hundred dollars was only payment of so much of an honest debt already existing and already due.

In paying it, Solomon did nothing more than he was strictly bound both by law and equity to do independently of his oral agreement, and he cannot be heard to say, in any forum, that such payment will operate as a fraud upon him in case his verbal agreement to pay the rest of his debt in land is avoided under the statute of frauds.

His discharge of record of his own mortgage on the Alanson land was not a fact of part performance at all. The land was considered worth eleven hundred dollars if received subject to the other mortgage of five hundred dollars and subject to detention of possession until October, and it was agreed to be conveyed in that shape, and as equivalent to eleven hundred dollars of the debt he owed Mrs. Colgrove. In what manner he should proceed to get the title in the condition in which he agreed it should pass to her, was a matter of perfect indifference on her part. It was something resting entirely with him, and important only to him. It was not an element of her bargain. He might collect his mortgage, or exchange it for other security, or remove it in any special way. The removal of it was an act preparatory to steps in the execution of his bargain. It was a measure he found it

COLGROVE v. SOLOMON.

necessary to adopt in order to get ready to enter upon performance of what he had promised, and not an act of part performance of the promise itself. He might urge with better reason that his employment of a scrivener to draw the deed, or his getting Mrs. Alanson to execute and acknowledge it, or his witnessing it, was an act of part performance.

Again, if we look at the act in view of the use now sought to be made of it, there is ground for saying it could have no greater or different force in the way of part performance than the payment of money, and that so considered it could not avail to prevent the application of the statute.

As previously stated, the first deed for the Alanson land was never accepted by any one, and was never considered as having any force as a grant. It was returned and retained. Moreover, it was defective by reason of insufficient attestation, and was not in accordance with the verbal bargain. The second deed was never accepted. Upon this the evidence was clear and uncontradicted, and there were no facts to disable Mrs. Colgrove from asserting the right to refuse it as a consequence of the nullifying operation of the statute of frauds.

But she was relieved from all obligation to accept it for the further reason that the insertion of a provision to reserve the crops was a material departure, and to her prejudice, from the terms and sense of the oral bargain.

The position of the circuit judge, and which is attempted to be maintained here, that the term of the verbal bargain for keeping possession until October included a right to the crops, is certainly unsound, and it seems probable that it was so considered by the grantors, since in framing the deed they were careful to insert a distinct reservation of the crops as well as one for possession.

The right to sever and remove the crops growing at the time of deeding, and likewise to crop the land during the season, was a valuable right. The possession of it bore

COLGROVE v. SOLOMON.

upon the valuation. It was not only distinct in its nature from the temporary privilege to retain possession, and not essential thereto, but of larger import under the circumstances, and there can be no question that the more important right was not included. In view of the facts, the stipulation for the privilege of possession until October, the valuation of the premises at eleven hundred dollars subject to that and to the mortgage of five hundred dollars, and the circumstance that nothing was said in the bargain about reserving a right to take crops, or any other right, amounted to a tacit exclusion of the right claimed.

There are numerous exceptions calling for an application of the rule prescribing the limits of cross-examination, and much space is occupied in the discussion of the subject. As there is no reason to suppose these matters can have any future importance in the cause, we shall not dwell upon them. The practice has been declared in former decisions, and it does not seem to have been misapplied in those particulars in which the evidence was allowed, but we are inclined to think the court miscarried in excluding the question put to Mr. Solomon. In saying this we do not intend to be understood as holding the evidence was admissible against other objections. It is manifest from what we have said in regard to branches of the defense, that much of the evidence was improper for reasons entirely distinct from the rule of cross-examination in question.

The views already expressed are believed to cover all the essential questions in the cause, and they necessitate a reversal, with costs, and a new trial.

The other Justices concurred.

HAESCIG v. BROWN.

Frederick Haescig v. John W. Brown.

Mortgages: Delivery of securities: Assignment without delivery: Payment.

A mortgagee having turned over to his wife a mortgage and note in satisfaction of claims held by her against him, and having afterwards formally assigned the same, without delivery, to a third person, the mortgagor having made payment to the wife and taken up the mortgage, was granted an injunction restraining such subsequent assignee from proceeding to foreclose the mortgage.

Mortgages: Bona fide purchaser: Possession of securities: Notice. One who buys securities which are not delivered to him, making only a nominal payment prior to his receiving notice of another's interest therein, is not entitled to protection as a *bona fide* purchaser.*Payment to one holding the securities: Taking bond of indemnity.* The fact that the mortgagor, on making payment to the wife, demanded and received indemnity against loss thereby, knowing that another made claims to the mortgage, is not a suspicious circumstance, nor is it conclusive evidence of a want of confidence in the validity of the claim set up by the wife.

Submitted on briefs June 20. Decided October 10.

Appeal in Chancery from Kalamazoo Circuit.

Mason & Melendy, for complainant, to the point that the delivery of the note and mortgage by Tripp to his wife, under the circumstances, constituted an equitable assignment thereof to her, the note being payable to bearer and passing by mere delivery, and the mortgage being only an incident to the debt and passing with it, cited: 3 *Mich.*, 587; 13 *Mich.*, 396; *Green v. Hart*, 1 *Johns.*, 580; *Walk. Ch.*, 251; *Ibid.*, 478; 6 *Mich.*, 70; that defendant has not shown himself a *bona fide* purchaser, never having seen the securities, and that the failure of his vendor to deliver them to him was sufficient to put him upon inquiry: *Kellogg v. Smith*, 26 *N. Y.*, 18; that as between the two claimants, the complainant was protected in paying his money to the holder of the securities: *Bachelor v. Priest*, 12 *Pick.*, 399; *Little v. O'Brien*, 9 *Mass.*, 423; *Manran v. Lamb*, 7 *Cowen*, 74; *Comp. L.*, § 4235; *Blackwood v. Brown*, 32 *Mich.*, 104; *Draper v. Fletcher*, 26 *Mich.*, 154.

HAESCIG v. BROWN.

Severens, Boudeman & Turner, for defendant, argued that complainant had full knowledge, when he made payment to Mrs. Tripp, of the dispute between her and defendant as to the ownership of the mortgage, and that he therefore paid her at his peril; and that the fact that he has taken and holds a bond of indemnity to save him harmless for payments he has made, indicates a want of confidence in the validity of Mrs. Tripp's title; that the claim that Mrs. Tripp had control of the mortgage, or that it passed to her in any way prior to September, 1866, is not supported by the proofs, and that in July, 1866, the defendant purchased the mortgage in good faith; that granting that Tripp consented to his wife's taking the note and mortgage in September, nevertheless defendant, having become a purchaser for value in July, has the better claim as being first in time: *Broom's Legal Maxims*, 260 *et seq.*; *Adams Eq.*, 45; *Halbert v. Cook*, 7 *Mon.*, 438; *McDonald v. Kneeland*, 5 *Minn.*, 352; *Muir v. Schenck*, 3 *Hill*, 228; *Bush v. Lathrop*, 22 *N. Y.*, 579; that if Tripp consented to his wife's taking the mortgage, it was as a mere gift, and she having paid no value, acquired no title thereby as against defendant, who was a purchaser for value and the legal and equitable owner.

MARSTON, J:

Complainant filed his bill to enjoin defendant from foreclosing a certain mortgage executed by complainant to secure the payment of a promissory note dated December 13, 1865, payable to James Tripp or bearer, and which he alleged had been paid by him to Rose Ann Tripp, the owner and assignee of the note and mortgage.

There are no questions of any importance whatever, except to the parties interested, raised in this case, and no lengthy discussion can therefore be indulged in.

It appears that James Tripp conveyed to Haescig the

HAESCIG v. BROWN.

mortgaged lands, and that the note and mortgage in question were given for a part of the purchase money.

It is claimed on the part of complainant that Rose A. Tripp, who was the wife of James Tripp, had some equitable interest beyond her homestead and dower rights in a part of the property conveyed to Haescig, and that she refused to sign the conveyance until after her husband had agreed that she should have this note and mortgage as her share; that James Tripp upon receiving the note delivered it to her, and that she retained possession thereof in accordance with such understanding. Also that in the fall of 1866 Tripp and wife separated, and that it was then agreed that Mrs. Tripp should have half the property, and that as a portion of her half she should retain this note; that she then had the note and mortgage in her possession, and handed them, in the presence of her husband, to her brother to collect and retain the money for her.

Defendant claimed that in July, 1866, he agreed to purchase this note and mortgage from James Tripp; that he then paid fifty dollars, and afterwards in September paid four hundred and fifty dollars more and gave his notes for the balance; that a written assignment of the note and mortgage was then made by James Tripp to him, and that in December following he notified Haescig of such assignment.

We are satisfied that complainant's claim is correct. Mrs. Tripp and her brother are both quite clear and positive that Mrs. Tripp should have this note. In this respect their testimony was uncontradicted. James Tripp was not sworn as a witness in the case. Defendant's evidence touching his purchase is far from being satisfactory. He made his bargain with Mr. Tripp in July, and then paid fifty dollars. He claims to have had no knowledge at this time that Mrs. Tripp made any claim to the note or mortgage, and he says that some time afterwards he learned that another person claimed an interest in them. Although the evidence is not clear, the fair inference is, that he ob-

HARSIG v. BROWN.

tained this information prior to making his payment of four hundred and fifty dollars and giving his note in September following, when the assignment was made. If the fact was that he did not have such notice until after the payment of September, he should have made this clear and apparent in his testimony. The fact that Tripp did not have the note in his possession in July, nor in September, that he did not deliver it to defendant at any time or account for its absence, should have led defendant to be more careful. No reason is given by defendant for his not insisting upon the production and delivery of the note to him.

The fact that complainant at the time he paid this note to Mrs. Tripp insisted upon being indemnified against loss thereby, is not, under the circumstances, suspicious as claimed. He had been notified that defendant claimed to have obtained an assignment of the note and mortgage from James Tripp. Now, although he may have had no doubt whatever but that the person holding possession of the note was the true owner and entitled to receive payment thereof, it was prudence upon his part to obtain, if he could, indemnity against any claim which defendant might set up. The giving of such indemnity by Mrs. Tripp might be considered as showing that in her opinion defendant's claim was worthless, rather than that it was of any value or validity.

The decree must be affirmed, with costs.

The other Justices concurred.

**The Grand Rapids & Indiana Railroad Company
v. Robert F. Judson.**

Negligence: Railroads: Usual manner of running trains. Negligence cannot be presumed, but must be affirmatively proved; and it cannot be presumptively negligent to run a railroad train in the usual manner, in the absence of proof that such usual manner is in itself improper.

GRAND RAPIDS & IND. R. R. CO. v. JUDSON.

Negligence: Question of fact: Weight of evidence. In an action to recover from a railroad company damages for injuries to horses, claimed to have arisen from neglect to keep up proper cattle guards, there being some testimony admitted without objection and having some tendency to prove the cattle guard insufficient, the submission of the question to the jury is held not to be error; a court of review will not consider the weight of evidence on writ of error.

Charge to the jury: Testimony of single witness. The refusal of the trial court upon request to put the case to the jury upon the testimony of a single witness, or to instruct them that if they believe such a witness their verdict should be for a particular party, is not error.

Heard June 21. Decided October 10.

Error to Kalamazoo Circuit.

Hughes, O'Brien & Smiley, for plaintiff in error.

Severens, Boudeman & Turner, for defendant in error.

CAMPBELL, J:

Suit was brought to recover damages for injuries to a mare and colt in the village of Kalamazoo. One count claimed the injury to have arisen from neglect to keep up proper cattle guards. The other charged negligence in running the trains.

So far as the latter is concerned, the only testimony in the case showed that the train in question was run in the usual way and with the usual precautions. As negligence cannot be presumed, but must be affirmatively proved, and as it cannot be presumptively negligent to run in the usual manner, without proof that such usual manner is itself improper (which can rarely happen), the defendant below was entitled to a charge that this cause of action was not made out.

Upon the question of the cattle guard, there was some testimony not objected to and not stricken out which had some tendency to show the cattle guard was insufficient. Inasmuch as all the testimony of persons acquainted with the construction of cattle guards swore to its sufficiency, and the evidence was very conclusive that the mare was caught

GRAND RAPIDS & IND. R. R. CO. v. JUDSON.

in it in a way which showed it was very different from what some witnesses had represented it, there is reason to believe a more complete cross-examination would have been desirable. But whatever may be our view of the weight or quality of this testimony, it is not clearly shown to have been based on guess-work and not on knowledge, and we cannot, therefore, hold that it was not open to the jury.

We do not think it error for a court to refuse to put the case to the jury upon the testimony of a single witness, or to decline instructing them that if they believe such a witness their finding should be for a particular party.—*Westchester Fire Ins. Co. v. Earle*, 33 Mich., 143. It may not be error to give such instruction, but where there are several witnesses who are in conflict, there may be very good reasons why such a course might be unfair, and tend to withdraw attention from important facts. A witness may be right in part and wrong in part, and a jury may be of that opinion. Isolating his testimony would naturally lead to an idea that if they accepted any they were bound to receive all of it, and cases may be found where this would lead to injustice. If the court does not plainly see that no such difficulty can arise, it is much safer to charge on the law and upon proper hypotheses, than to put the case upon the testimony of a single witness.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

LINDSLEY v. LAMB.

Jesse G. Lindsley v. John A. Lamb.

Deeds: Execution in blank: Grantee: Consideration: Description: Agency: Authority. A blank deed executed in a foreign state, containing no name of grantee, no consideration, and no description of property, and which came in that condition into this state, where the blanks for grantee, price and description of property were filled in by some one not shown to have authority, in writing or otherwise, from the grantor, in the hands of one having notice of the facts, can have no force or validity as a conveyance of title.

Submitted on briefs June 21. Decided October 10.

Error to St. Clair Circuit.

B. C. Farrand, C. R. Brown and W. T. Mitchell, for plaintiff in error.

A. E. Chadwick, for defendant in error.

CAMPBELL, J:

This case presents but one question, relieved from the complications usually attending instruments like that in controversy.

The case finds that Avery W. Stowell, was a former owner of the lands in controversy in this suit, which is an ejectment suit, and that he resided during his life at Syracuse, in the state of New York, and died there in 1844, leaving a widow, now Louisa S. Norton, and one child and heir at law, Elizabeth P. Bradley, both residing in California in April, 1868.

On the 13th of April, 1868, these two persons, with their husbands, executed and acknowledged in California, before two witnesses and a Michigan commissioner, a blank quitclaim deed, containing no name of grantee, no consideration, and no description of property.

The deed came in that condition into the state of Michigan, but it does not appear in whose custody. Somebody, but who, or under what authority, does not appear, made a

LINDSLEY v. LAMB.

bargain for the sale of the land in question, and filled in the blanks for grantee, price, and description of property. The grantee thus named was the plaintiff in error. The deed was recorded, but by whom or under what circumstances left for record does not appear. It was afterwards delivered by Mrs. Norton to the attorney for the plaintiff in error. This record was in September, 1868. The circuit court held that title was not made out by these facts.

The case is too bald to require discussion. If such a deed could become operative under our statute, which requires an agent's authority to be in writing, it could only be by estoppel. There can be no deed without a grantee. There is no finding that the heir, Mrs. Bradley, ever authorized any one to act for her in the matter, nor that the purchaser did not receive the deed with full knowledge of the condition in which it was acknowledged, and without any assurance of any right in any one to complete the conveyance. As the case stands it presents the simple question whether a conveyance in blank received by a party with full knowledge is equally valid with a formal deed completely executed and acknowledged and perfect in all its parts. That question can have but one answer. Any attempt upon such a record to discuss the doctrines which might apply in some supposable case would be improper as purely speculative. On the facts before us there is nothing to show any right, either legal or equitable.

The circuit court ruled correctly, and the judgment must be affirmed, with costs.

The other Justices concurred.

GUSTIN V. BURNHAM.

Maggie Gustin v. Cynthia Burnham and another.

Ejectment: Purchasers from administrator: Agreement to pay rent to widow: Dower: Terminating tenancy. Purchasers from an administrator having gone into possession under an understanding with the widow of decedent that they should have the occupation and enjoyment, not only in their own right, but also in her right as dowress, rendering to her a reasonable compensation by way of rent, such widow cannot maintain ejectment against them without first terminating the tenancy.

Submitted on briefs June 21. Decided October 10.

Error to St. Clair Circuit.

A. E. Chadwick, for plaintiff in error.

Mitchell & Avery, for defendants in error.

COOLEY, CH. J:

There ought to have been in this case a more specific finding of the facts before it was brought to this court for review.

It is inferable from the finding that administration was had on the estate of James L. Gustin, and that defendants hold by purchase from the administrator. It is also inferable that when they went into possession it was under an understanding with the plaintiff that they should have the occupation and enjoyment, not only in their own right, but also in her right as dowress, rendering to her a reasonable compensation by way of rent, the amount of which, however, was not agreed upon. This must have been the understanding the circuit judge had of the facts; and if so, he was right in holding that the plaintiff could not maintain her action without first terminating the tenancy. Whether he was also right in his suggestion that the plaintiff might have had her dower assigned in the probate court, is a question not involved in this suit, and which would depend on other facts than those which are embraced in this finding.

GUSTIN v. BURNHAM.

The judgment must be affirmed, with costs, and the cause remanded to give the plaintiff an opportunity to take a new trial under the statute if she shall so elect.

The other Justices concurred.

Morris Green v. Henry Belitz.

Highways: Curative act: Private ways: Obstructions: Charge to the jury. The statute (Comp. L. 1871, § 1268) designed to cure defects in the laying out and recording of highways, has no application to mere private ways, but is confined to public highways; and in an action to recover damages for injuries caused by obstructions placed in a roadway, where it is disputed whether the road was a public or a private way, a charge to the jury that if the way in controversy was, on March 15, 1861, a road not recorded, but had been used as such for ten years or more, then the same by force of said statute became and was a public highway, is held to be error.

Submitted on briefs June 21. Decided October 10.

Error to Oakland Circuit.

A. C. Baldwin, for plaintiff in error.

C. & W. N. Draper, for defendant in error.

MARSTON, J:

Belitz brought an action of trespass on the case to recover special damages sustained by him on account of an alleged obstruction of a public highway by defendant.

There was evidence given on the part of the plaintiff tending to show that the road in question had been used as a highway for more than twenty years; that it was four rods wide up to 1863, when defendant fenced it in, leaving it less than twenty-six feet wide; that in 1866, and again in 1869, defendant drew and deposited stone in the road, which

GREEN V. BELITZ.

caused the snow to accumulate in drifts upon the road; that plaintiff had, without fault on his part, broken his wagon and sleighs upon these stones, and was otherwise injured on account of the snow drifts, as he had no means of ingress or egress to his farm except by this road. Evidence was also given by the plaintiff tending to show that a survey of this road had been made and recorded, and that highway labor had been performed thereon in 1871 and 1872, and that plaintiff had worked out his road tax upon this road under defendant's directions as overseer of highways. On the part of the defendant evidence was given tending to show that the road in question was not a public highway, but a private way, used under an agreement made with a former proprietor of the land owned by plaintiff; that no public road had ever been laid out over this line, and that the land had never been dedicated or condemned for a highway.

The plaintiff claimed, and the court at his request charged, that if the jury should find the way in controversy was, on the 15th day of March, 1861, a road not recorded, and that the same had been used a period of ten years or more, then the same by force of the statute (§ 1268, *C. L.*) became and was a public highway. The force and effect of this instruction was, that a mere private way, used as such for a period of ten years, became by force of the statute a public highway. The statute cannot receive such a construction. The legislature never intended by any so summary a process to convert private into public highways. This section has no relation to private ways. It applies to public highways, and was designed to cure defects in the laying out and recording of the same where they had been used as a public highway the time fixed by the statute. It was not the intention that a private way, no matter how long it may have been used as such, should, upon the taking effect of this act, become public. No such radical change was intended.

We do not consider it necessary to discuss at length the

GREEN v. BELITZ.

other questions raised. The plaintiff's declaration set forth a cause of action, and the evidence introduced by him to show the special damages he sustained was admissible in case the highway was a public one. Defendant's ninth request was too broad, and properly refused. If plaintiff voluntarily ran against the stone and broke his wagon, still that would not prevent his right to recover any other legitimate damage which he sustained on account of the obstructions. Had the request been confined to his right to recover as damages the injuries sustained by the wagon alone, the request would have been unobjectionable. These remarks will apply likewise to defendant's seventh request.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

John Leonard v. Henry Woodward and another.

Attachment: Service: Certified copy: Inventory: Formal defects. The fact that the copy writ of attachment served was not certified by the officer, where it is in fact a true copy, and where it is accompanied by a copy of the inventory of property attached, duly certified, does not render the service invalid, the defect being purely formal.

Default for want of plea: Affidavit: Record: Judicial notice. The failure to file an affidavit for a default cannot be taken advantage of on error, such affidavit being no part of the record; the purpose of this affidavit being but to inform the court of that of which he is bound to take judicial notice, i. e., that no plea had been filed, it is not error to order judgment without it.

Submitted on briefs October 4. Decided October 10.

Error to Benzie Circuit.

Edwin S. Pratt, for plaintiff in error.

W. H. Francis and *Fowler & Harley*, for defendants in error.

LEONARD V. WOODWARD.

COOLEY, CH. J:

The writ of error in this case brings up a judgment rendered on default in a suit by attachment. A number of objections are taken to the proceedings, all of which are technical. The only objections which appear to us to require notice are the following: that the copy of the writ which was served on the defendant was not certified by the officer; and that default for want of plea was entered without the filing of any affidavit showing an actual default.

As to the first of these objections, the sheriff returned that he served a copy of the writ, and this fact is not disputed. He also returned that at the same time he served a copy of the inventory of the property attached, duly certified. We cannot think the court failed to obtain jurisdiction of the person of the defendant by reason of the omission of the formal certificate to the copy served. The defect was purely formal, and the certificate to the copy inventory which was served with it could not have left the defendant in any doubt regarding the character of the proceeding. It is impossible that he could have supposed the service to be other than a service of authentic papers.

Nor can the failure to file an affidavit for a default be taken advantage of here. Indeed, we cannot legally know that one was not filed. The affidavit is not a part of the record, and the record would not necessarily show whether one was filed or not. The record would only inform us that, after the expiration of the time for pleading, no plea having been filed, default was entered and judgment taken. There is no error in this. But in any case of this nature the affidavit could only inform the court of that which he must take notice of without it; namely, that no plea had been put upon the files. If the court took judicial notice of the fact, and ordered judgment without it, no harm is done and no error committed.

The judgment must be affirmed, with costs.

The other Justices concurred.

DANAHER v. HITCHCOCK.

Patrick M. Danaher and another v. Thomas A.
Hitchcock.

Declaration: Promissory notes: Partnership name. A declaration against two defendants, on common counts, with promissory note appended, purporting to be signed in a firm name, is not open to demurrer for a failure to aver that defendants are partners.

Declaration: Venue. The omission of the venue in a declaration is not, under our statute (*Comp. L., 1871, § 6193*), a demurrable defect.

Submitted on briefs October 10. Decided October 11.

Error to Mason Circuit.

This was a declaration on common counts with a promissory note appended, signed Danaher & Melendy. The declaration contained no venue. The bill of particulars limited the recovery to the promissory note. Defendants demurred, and the demurrer being overruled and judgment rendered for plaintiff, they brought error.

White & Haight, for plaintiffs in error, in support of the demurrer argued that the want of venue was a fatal defect; and that the declaration was also defective in not averring the copartnership of defendants, and that they as copartners made the promise sued upon.

C. G. Wing, for defendant in error.

PER CURIAM:

There is nothing in the exceptions relied upon. That which relates to the want of an averment of defendants' partnership is covered by *Pegg v. Bidleman*, 5 Mich., 26, and that which relates to the venue is settled by the statute.

The judgment is affirmed, with costs.

ROBBINS V. BARRON.

Lucinda A. Robbins and another v. William B. Barron.

Tax liens: Statute construed: Subsequent tax-title. The statute (*Comp. L. 1871, § 1131*) authorizing a recovery for the amount paid by the plaintiff for tax-titles which for certain specified reasons are not valid, and making the same a lien upon the land, does not warrant a judgment declaring the amount so paid by plaintiff a paramount lien to that of a subsequent tax-title held by another upon the same land, which, though invalid as a title, is within the protection of the statute as a lien on the land.

Submitted on briefs and decided October 11.

Error to St. Clair Circuit.

Atkinson & Atkinson, for plaintiffs in error.

George E. Wasey and F. A. Baker, for defendant in error.

PER CURIAM:

In this case a judgment is entered declaring the amount paid for tax-titles and for taxes by Barron a paramount lien on the land, and the land is ordered to be sold for satisfaction of the amount. This is done on the assumption that his tax-titles did not convey the land, and in the face of the subsequent tax-title of John Atkinson. This the judge finds is invalid, but on grounds that would not invalidate a lien on his behalf for the amount of the tax paid. On what ground Barron's lien is to be preferred to Atkinson's we are not informed, nor can we conjecture.

There are some difficulties in giving a proper construction to the statute under which Barron obtained judgment for taxes paid, but they are not important here, because in any view he showed no right of recovery. The statute (*Comp. L., § 1130*) limits the right to question a tax-title to one having "title," and the judge expressly finds that Barron had no title. He had only a claim for taxes paid, and that, for all that appears in this record, if not cut off by Atkinson's purchase, would certainly be subordinate to it.

The judgment is reversed, with costs, and a new trial ordered.

FARMERS' LOAN AND TRUST COMPANY v. ST. CLAIR.

The Farmers' Loan and Trust Company v. Eugene G. St. Clair.

Replevin: Special interest: Verdict: Amount. In replevin where the verdict is for defendant and he claims only a lien upon or special interest in the property, the general title being in the plaintiff, it is essential under our statute that the verdict should specify the amount of defendant's interest.

Heard and decided October 11.

Error to Marquette Circuit.

This is replevin, brought by plaintiff in error to recover possession of a train of cars and locomotive seized by defendant in error as town treasurer, for taxes assessed upon the lands of the Marquette, Houghton & Ontonagon Railroad Company for the year 1873. Plaintiff in error claimed title as mortgagee of the railroad company. The cause was tried by jury and the defendant recovered a verdict and judgment, but the verdict failed to specify the amount of the defendant's lien or interest.

W. D. Williams, W. P. Healy and John Atkinson, for plaintiff in error.

James E. Daliba and Hoyt Post, for defendant in error.

THE COURT held that the verdict was clearly irregular under the statute, in that it failed to find the amount of defendant's lien or interest.

Judgment reversed, with costs, and a new trial granted.

CANFIELD v. CANFIELD.

Bettie C. Canfield v. Augustus H. Canfield.

Divorce: Bill: Adultery: Venereal disease: Extreme cruelty. A bill for divorce, which, in stating a case for divorce on the ground of adultery, avers the contracting by defendant of a venereal disease, will authorize a decree on the ground of extreme cruelty, where the proofs clearly substantiate the fact so averred.

Heard and decided October 11.

Appeal in Chancery from Wayne Circuit.

D. C. Holbrook and Ward & Palmer, for complainant.

R. P. & J. B. Eldredge, for defendant.

Leonard Grover and others v. William L. Buck.

Attachment: Affidavit: Amount due. An affidavit for a writ of attachment, which states positively the amount due over and above all legal set-offs, is not objectionable for want of the qualifying words "as near as may be;" the affiant states the sum as near as may be when he states it exactly.

Attachment: Appraisers: Members of defendant's family. It is not open to one whose goods have been taken upon an attachment, to object, when the attachment proceedings come collaterally in question, that the appraisers were members of his own family and consequently not disinterested, not freeholders, and were not sworn, where, though personally served and not shown to have been ignorant of the facts, he made no such objection in the attachment suit, the return averring that the appraisers were disinterested freeholders, and duly sworn; the statutory requirement of disinterested freeholders as appraisers is for his protection, and it cannot be presumed members of his family have an interest adverse to his.

Attachment: Levy: Endorsement: Appraisal. The fact that no levy is endorsed on an attachment is immaterial where the sheriff's return upon the writ recites a levy and is accompanied by the appraisal.

Trover: Growing crop: Attachment levy: Measure of damages: Evidence. In an action by the sheriff against parties who have converted to their own use a growing crop upon which he had levied an attachment, the judgment in the attachment suit, though rendered after the conversion, is admissible in evidence to show the amount of the plaintiff's lien.

GROVER v. BUCK.

Attachment: Growing crops: Constructive possession: Bond. In case of an attachment of a growing crop, constructive possession is all that is required or contemplated by the statute; and the provision for a bond is applicable and appropriate as a protection against removal when in its ripened condition the crop shall have become fit for removal.

Statute of frauds: Interest in lands: Correct ruling: Immaterial remarks. A parol arrangement, whereby a man who had deeded land to his wife, reserving to himself by written contract the right of possession and to repurchase within five years, bargains to give up his right under such contract, is void under the statute of frauds; and a ruling to that effect is not made erroneous by the judge's adding incidentally that "if the arrangement amounted to any thing, it would make the wife tenant of the husband, which was impossible," such further remark being immaterial.

Heard June 20. Decided October 12.

Error to Calhoun Circuit.

Brown & Patterson, for plaintiffs in error.

I. G. Pray, for defendant in error.

COOLEY, CH. J:

The action in the court below was brought by Buck, who was sheriff of the county of Calhoun, against parties who had taken away and harvested certain wheat which he had attached as a growing crop, by virtue of an attachment against Powell Grover and others.

1. The defendants below insisted that the attachment was invalid because the affidavit annexed to it did not comply with the statute. The statute (*Comp. L.*, § 6398) requires the affidavit to state "that the defendant therein is indebted to the plaintiff, and specifying the amount of such indebtedness, as near as may be, over and above all legal set-offs." The affidavit in this case stated that the defendants "are indebted to said plaintiff in the sum of six thousand and fifty dollars over and above all legal set-offs." We see no reason to doubt its sufficiency. It is a positive assertion that a sum certain is due; and when that can be stated, the qualifying words "as near as may be" are wholly unnecessary. The affiant states the sum as near as may be when he states it exactly.

GROVER V. BUCK.

2. A second objection to the attachment proceedings was, that the appraisers called in by the officer to appraise the property were sons of Powell Grover, and consequently not disinterested. It was also shown that they were not freeholders and were not sworn. The statute requires that the appraisal shall be by disinterested freeholders and under oath.—*Comp. L.*, § 6403. Whether a failure to comply with it would render the proceedings void under any circumstances we need not inquire, as we are satisfied that under the facts disclosed here the objection could not avail. The statutory provision has the interest of the defendant in the attachment particularly in view, and it requires disinterested freeholders for his protection. If members of his family are called upon to act as appraisers, it cannot be presumed that they have an interest adverse to his, and when the proceedings are attacked collaterally there ought at least to be some showing that the defendants, if personally served, as was the case here, had objected to the want of qualification in the appraisers, or were ignorant of the facts. Nothing of the kind appears in this case, and the sheriff's return, which states that the appraisers were disinterested freeholders, and duly sworn, was not disputed or assailed in any manner in the attachment suit.

3. Another objection was, that no levy was endorsed on the attachment. But the sheriff's return upon the writ recited a levy, and was accompanied by the appraisal, and that was sufficient.

4. To show the amount of his lien the sheriff was allowed to prove the judgment in the attachment suit, though it was rendered after the alleged conversion of the property by these defendants. There was no error in this; it was the only way in which the amount for which the sheriff had a lien on the property could be determined.

5. It is claimed that the attachment of the wheat was invalid, because the officer failed to take possession. This objection to the proceedings is made under *Comp. L.*, § 6409, which provides that the property attached shall

GROVER v. BUCK.

remain in the hands of the officer serving the attachment, unless the defendant or other person in whose possession it may have been found shall give bond, etc. But all the possession the statute can intend must be such as the nature of the property renders it susceptible of; and in the case of a growing crop, it could be constructive possession only. The circuit judge so held, and we do not see how he could have done otherwise. It is supposed by counsel that the provision for a bond would be idle under such circumstances; and so it would be if the crop were not all the while approaching a time when in its ripened condition it may be removed; and against such removal the bond would be as important in this case as in any other.

6. Several objections were taken to the judge's charge, and to his refusal to give certain instructions which were requested by the defendants. In the main the instructions requested seem to be covered by the charge as given, and we are not satisfied that any error was committed in refusing the others. One instruction was particularly complained of, namely: that a wife cannot be tenant of her husband. This must be considered in connection with the facts in evidence, which were that Powell Grover had deeded the land on which the wheat was raised to his wife, reserving to himself by written contract the right of possession and the right to re-purchase within five years; that afterwards he made a verbal arrangement with his wife, whereby he gave up his rights under the contract in consideration of her agreeing to pay certain debts. The circuit judge held this arrangement void under the statute of frauds; but incidentally remarked that "if it amounted to any thing it would make the wife tenant of the husband, which was impossible." As he was correct in holding the arrangement invalid, because not evidenced by writing, the further remark was immaterial.

We find no error in the judgment, and it must be affirmed, with costs.

The other Justices concurred.

CHAMBERS v. HILL.

Theodore W. Chambers v. Augustus H. Hill.

Title to personally: Administrator: Dealings between decedent and his son.

In a controversy between an administrator and the son of the deceased as to the title to certain personal property formerly owned by decedent and now claimed by the son, much liberality should be indulged in receiving evidence having any legitimate tendency to show what the understanding was between the father in his lifetime and the son regarding the ownership of the property in controversy.

Evidence: Conversations: Substance: Exact words used. While a witness testifying to declarations of a party, or conversations, should give the words used if able so to do, yet a general answer, embodying the substance or purport, is not objectionable where that is all the witness can recollect.

Rulings that do not prejudice. The striking out of an answer to a specific question, though improper, is held not to be error where the ground of the evidence stricken out is substantially covered by other testimony in the case, and it does not appear that the party complaining of it was injured by the ruling.

Evidence: Matters equally within knowledge of decedent. In a suit between an administrator and a son of the deceased, involving the title to personal property claimed by the administrator to belong to the estate, the son is precluded by the statute (*Comp. L. 1871, § 5968*) from testifying as a witness to conversations between himself and his father in the lifetime of the latter, as being matter equally within the knowledge of the deceased.

Evidence: Rebuttal: Negative testimony. A witness having testified to a material conversation in the family of the deceased, it is not competent in rebuttal thereof to call a neighbor to testify merely to having never heard such a conversation in the family; such negative testimony has no positive legal value.

Father and son: Promise to support: Transfer of personal property: Testamentary gifts. An arrangement between father and son for an immediate and actual transfer of personal property by the former to the possession and control of the latter, in consideration of his undertaking to support and to provide for his parents, will warrant the son, if he has performed on his part, in detaining and claiming title to the property upon his father's death, and as against the administrator; and in a controversy over the title between such son and administrator, there being evidence tending to establish such an agreement and performance, it is held error to put the case to the jury as one involving a promise of a testamentary gift, instead of a present sale.

Heard June 20. Decided October 13.

Error to Kalamazoo Circuit.

This is trover, brought by Hill, as administrator of the estate of John A. Chambers deceased, against a son of the deceased, for the conversion of certain stock, grain and farm-

CHAMBERS v. HILL.

ing implements which the plaintiff claimed belonged to his intestate, and the son claimed as his own.

Severens, Boudeman & Turner, for plaintiff in error.

May, Buck & Powers, for defendant in error.

COOLEY, CH. J:

When this case was brought to our attention before (*Hill v. Chambers*, 30 Mich., 422), we endeavored to indicate rules which should govern on a new trial, and after a careful review of the present record, we are satisfied that in the main the circuit judge has kept within them. In a few instances it is possible that he may have been too liberal in admitting evidence that could have only a remote bearing on the controversy; but as we showed on the former occasion, the case is one in which the court should be very liberal in receiving evidence that can have any legitimate tendency to show what was the understanding of the parties regarding the ownership of the property in controversy. In some cases we think evidence which was excluded might properly have been received; but we have not been able to satisfy ourselves that any to which the defendant had a clear legal right was shut out, or that he was injured by any ruling in that regard. Some irrelevant evidence was received under objection, but not of a character to be prejudicial.

Mrs. Bixby, a witness for the defendant, having testified to living in the family of the intestate for a short time, was asked the following question: "How did the intestate generally speak about the ownership of the property, if you heard him say any thing about it?" To this the reply was: "As being Theodore's,—the defendant's." On motion of the plaintiff, this evidence was stricken out without any reason being assigned. In this court it is said the ruling was right, because the answer only gave the conclusion of the witness from what she heard, and did not give what the intestate

CHAMBERS v. HILL.

said. This suggestion has no force. The witness should certainly have given the words of the intestate if she could do so, but the general answer was not objectionable, and might have been the only one she was able to give. That the intestate spoke of the property as his son's, was a fact which she might know and testify to, without being able to repeat the words or any of them; the main fact would be likely to impress itself upon the mind, while particular expressions might not be noted or retained.

But the ruling could not have prejudiced the defendant. The same witness was allowed to state that the intestate told her Theodore was coming home to take care of him and his wife, and that they were going to turn over all the property to him; and that after Theodore came there, the intestate told her he had given Theodore all his property. Also that she heard conversation in the family in regard to the ownership of the property,—as to its being Theodore's,—and that he was to furnish for them and provide for them. This seems substantially to cover the ground of the evidence which was stricken out; and as the defendant was not restricted in his examination into particulars on this subject, it is impossible to suppose he was injured by the action he complains of.

On the part of the plaintiff evidence was given that the defendant at one time in 1869 talked with his father and mother about leaving the farm and going south, assigning for a reason that the family was too large, and that he was told by his father to go if he wanted to. The defendant subsequently took the stand, and was asked if he made any such statements. This question was ruled out, on the ground that it called for facts which must have been equally within the knowledge of the intestate, and was therefore inadmissible under the statute of 1861, which, in allowing parties to testify generally, prohibits their doing so "in relation to matters which, if true, must have been equally within the knowledge" of the deceased person. In *Wright v. Wilson*, 17 Mich., 192, 201, it was said that "the principal object

CHAMBERS v. HILL.

of this prohibition, we think, was to prevent a living party from obtaining an unequal advantage from his own testimony upon matters known only to himself and the deceased, or better known to them than to others, and of which the deceased party can of course no longer speak." In the same case it was decided that the statute would not preclude the surviving party testifying to matters of public notoriety, such as the occupation of land, notwithstanding the deceased party might have been equally cognizant of the same facts. This case is not of that nature. Although the alleged conversation, if it took place as was testified, may have been heard by third parties, yet as it took place between the defendant and his father as parties concerned, and related to their own business, it is reasonable to assume that the facts concerning it were better known to them than they were to others. It was reasonable and proper, therefore, that as one party was silent in death, the party claiming adversely to his representatives should be equally precluded from giving testimony on his own behalf.

Following this exclusion, Mrs. Bixby was again called, and asked if she heard any conversation in the family concerning Theodore going south. This question was objected to and ruled out. The reason probably was, that it was merely negative testimony, and could have no reasonable tendency to show that the alleged conversation did not take place. Had the witness lived in the family at the time, the proposed evidence might have had some value, especially as the subject was one of high importance to the parties concerned, and if spoken of at all would have been likely to be discussed more or less by all the family. But the fact that a matter of family concern is not talked about before the neighbors, is no evidence that it is not talked about at all; and negative evidence of the character proposed has positively no legal value whatever.

We deem it important to notice but one other ruling, and that, unfortunately, renders it necessary that the case should be remanded for another trial. The circuit judge

CHAMBERS v. HILL.

instructed the jury that if they should find that the intestate promised the defendant that if he would take care of him and his wife while they lived he should have the property after their death, or after they had done with it, but that such personal property was not actually transferred to defendant in the lifetime of the intestate, the promise would be no defense to the suit. Also "if you find that the defendant has failed to establish the fact of an absolute transfer of the property, but that the agreement entered into between the parents and son was that the defendant should have the property that should be left after the parents deceased, then such arrangement between them would not transfer the personal property in question, but would be utterly void in this respect, and would constitute no defense in this case."

Of this instruction we remark that,

1. It ignores the question, which was a vital one in the case, whether the property in dispute ever belonged to the father at all; whether, if it were not Theodore's, the title was not in the mother, who owned the farm, in which case the action of trover by the father's administrator must fail, irrespective of any other defense; and,

2. It assumes that there was evidence in the case that the arrangement between the parties was, that the title should pass to the son only on the death of the survivor of his parents. Had there been such evidence, the circuit judge would have been correct in instructing the jury that the arrangement, if the father was owner of the property, would be no defense to the action; not for the reason stated by him, that the arrangement would be void, but for the reason that the time had not arrived when Theodore's title under the arrangement, which would be in effect a purchase, was to vest. But we do not find that the evidence tended to show such an arrangement as the instruction supposed. The defendant planted his defense upon an agreement for an immediate and actual transfer of the property to his possession and control, in consideration of his undertaking to

CHAMBERS v. HILL.

support and provide for his parents; and it was such an agreement that his evidence tended to establish. If he made out the agreement, he was entitled to a verdict; if he did not, and the jury were satisfied the property belonged to the father at the time of his decease, the verdict should have been for the plaintiff. The instruction which was given seems to us calculated to mislead the jury, by suggesting to them that the evidence tended to show what it did not,—a promise of a testamentary gift, rather than a present sale,—a suggestion the more likely to be misleading from the fact that, even under the defendant's claim, the consideration for the property would not fully be paid until the father's death, so that the transaction, though not intended to be testamentary in its nature, would still be sufficiently like it to render the suggestion plausible. We cannot avoid feeling that this instruction may have been mischievous, not only in what it omitted, but also in what it suggested, and though possibly in any case the verdict should have been what it was, we think the defendant is entitled to a new trial.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

INDEX.

INDEX TO CASES REPORTED IN THIS VOLUME.

ABANDONMENT.

See PRACTICE IN SUPREME COURT, 7.

ABATEMENT.

See EQUITY JURISPRUDENCE, 10: FORECLOSURES, 12, 13: RENTS, 1.

ABUSE OF CONFIDENCE.

See REPLEVIN, 4.

ACCEPTANCE OF PLEA.

See BAIL BONDS, 5.

ACCOUNTING.

See SCHOOL DISTRICTS, 2, 3.

ACQUIESCENCE.

See EQUITY PLEADING AND PRACTICE, 10.

ACTION ON THE CASE.

Injury alone will not support an action on the case; there must be a concurrence of injury and wrong; and if the act be not unlawful in itself, then, unless done in a manner, at a time or under circumstances, which render it wrongful or lacking in due regard for the rights of others, there can be no liability for any injury that may result.—*Macomber v. Nichols*, 212.

ACTUAL TERMS.

See EVIDENCE, 34.

ADJACENT OWNER.

See HIGHWAYS, 7.

ADJUSTMENT.

See GOODS SOLD AND DELIVERED, 2.

ADMINISTRATION.

See ESTATES OF DECEASED PERSONS, 3-6.

ADMINISTRATOR.

See CONTRACTS, 21: ESTATES OF DECEASED PERSONS, 1: EVIDENCE, 40: INSURANCE, 2.

ADMISSIONS.

See EVIDENCE, 9, 33, 38: INSURANCE, 3: PLEA, 2: PRACTICE IN CIRCUIT COURTS, 3.

ADOPTION OF PARTS OF OTHER STATUTES.

See LEGISLATION, 2.

ADULTERY.

See DIVORCE.

ADVANCES.

See QUANTUM VALEBAT, 6.

ADVERSE CLAIMANT.

See BANKS, 1-6.

ADVERSE HOLDING.

See RENTS, 7.

ADVERSE TITLE.

See FORECLOSURES, 5-8.

AFFIDAVIT.

See ATTACHMENT, 6: CAPIAS AD RESPONDENDUM: LOG-LIEN LAW, 1-3: PRACTICE IN CIRCUIT COURTS, 2: PRACTICE IN SUPREME COURT, 18.

AFFIRMATIVE.

See BURDEN OF PROOF, 1, 2.

AFTER-ACQUIRED CHATTELS.

See CHATTEL MORTGAGES, 5-7.

AGE.

See EVIDENCE, 23.

AGENCY.

1. Where one under contract to drive another's logs at a fixed sum per thousand has procured board for his laborers upon representation that his principal would pay for the same, the principal will nevertheless not be holden therefor in the absence of any authority in his contractor thus to bind him, without some showing of contract relations between himself and the person furnishing such board; and a promise by the principal to his contractor to pay money for the latter's own benefit, and which was to be chargeable on the contract price, is not an authority to him to incur debts in his principal's name.—*Frost v. Lawler*, 235.
 2. A principal is not holden for an indebtedness incurred in his name without authority by an agent, where he has never held the agent out as having such authority, or done anything to ratify the unauthorized act; and much less where the credit was originally given to the agent and not to the principal.—*Grover & Baker Sewing Machine Co. v. Polhemus*, 247.
 3. An agent can never invest himself with authority so as to bind his principal, by mere false statements to others with whom he deals as to the extent of his authority.—*Ibid.*
 4. Where an agent is furnished a horse by his principal, which he is himself to feed and take care of, the fact that the employment of the horse by the agent in the prosecution of the principal's business afforded a profit to the latter, is nothing to the point as to his being liable to pay for the board and keeping of the horse, procured by the agent on credit without authority.—*Ibid.*
- See CONTRACTS, 18: CORPORATIONS, 1-4: DEEDS, 5: DIRECTORS OF THE POOR: EVIDENCE, 20, 22, 33: PARTNERSHIP, 4: PROMISSORY NOTES, 2-6: SETTLEMENTS, 1, 2.

AGENTS.

See AGENCY, 1-4: DETROIT HOUSE OF CORRECTION, 2.

AGREEMENT TO ASSUME AND PAY A MORTGAGE.

See FORECLOSURES, 1-4.

AGREEMENTS.

See CONTRACTS: LEASE.

AID TO RAILROADS.

See CONTRACTS, 14: EVIDENCE, 24, 25: FINDING OF FACTS, 3.

ALLEGATION OF CONSIDERATION.

See EQUITY PLEADING AND PRACTICE, 6.

ALLOWANCES.

See WILLS, 1.

ALTERATION.

See PROMISSORY NOTES, 13.

ALTERNATIVE RELIEF.

See EQUITY PLEADING AND PRACTICE, 8.

AMBIGUITY.

See WILLS, 1, 2.

AMENDMENTS.

See ATTACHMENT, 3: INFORMATIONS.

AMOUNT.

See AWARDS, 2: DAMAGES, 1-5: EQUITY JURISPRUDENCE, 8:
FORECLOSURES, 2: REPLEVIN, 7.

AMOUNT DUE.

See ATTACHMENT, 6.

ANNOYANCE.

See NUISANCES, 1.

ANOMALOUS PROCEEDINGS.

See EJECTMENT, 3.

ANSWER.

See EQUITY PLEADING AND PRACTICE, 9, 10: ESTOPPEL, 7.

APPEAL.

See JUSTICE'S COURTS, 1, 2: WRIT OF ERROR, 2.

APPEAL BOND.

See JUSTICE'S COURTS, 2.

APPEARANCE.

See LOG-LIEN LAW, 3: PRACTICE IN SUPREME COURT, 8.

APPEARANCE BAIL.

See BAIL BONDS, 1-8.

APPLICATION.

See HIGHWAYS, 1: INSURANCE, 13: TAXATION, 1, 2.

APPLICATION OF PAYMENTS.

1. H, having claims against two firms, of each of which B was a member, took B's notes in part payment, endorsed by a third firm of which B was also a member, and B having afterwards died, H presented his claim against the estate of B, crediting the amount of these notes as payment, so as to balance one of the accounts, but at the same time submitting a written statement that in presenting his claim as he did, he did not waive any rights against the survivors of either of the firms:—*Held*, That considering the manner of submitting this claim against the estate in connection with such disclaimer, it is evident that H had no intention of making, and did not thereby make, any application of the payment made by the notes.—*Youmans v. Heartt*, 397.
2. Where the parties do not make a specific application of moneys paid, the law will apply it usually as the justice and equity of the case may require.—*Ibid*.
3. The trial court having made such a distribution of the payment by notes upon the indebtedness of the two firms respectively as resulted in a *pro rata* application upon each, it cannot be said that any error was thereby committed to the prejudice of the survivors of either of said firms.—*Ibid*.

APPOINTMENT.

Of Commissioners: See EMINENT DOMAIN, 1.

Of Guardian: See LETTERS OF GUARDIANSHIP, 1, 2.

APPORTIONMENT.

See RENTS, 1.

APPRAISAL.

See ATTACHMENT, 7, 8: REPLEVIN, 1.

APPRAISERS.

See ATTACHMENT, 7.

APPROPRIATING PROPERTY OF ANOTHER.

See CONTRACTS, 8: LEGISLATIVE ACTION, 2.

APPROPRIATION.

See LEGISLATIVE ACTION, 2.

ARBITRATION.

See AWARDS, 1-3.

ARTICLES OF MERCHANDISE.

See DAMAGES, 2, 4.

ASSAULT WITH INTENT TO RAVISH.

It is competent, under an information charging rape, for the jury to find the respondent guilty of assault with intent to ravish. —*Campbell v. People*, 351.

ASSESSMENT OF TAXES.

See WRIT OF ERROR, 2.

ASSESSMENTS.

See VOLUNTARY PAYMENT, 1-5.

ASSESSOR.

See SCHOOL DISTRICTS, 1-3.

ASSETS.

See ESTATES OF DECEASED PERSONS, 4-6.

ASSIGNEE.

See RENTS, 2-4.

ASSIGNEE IN BANKRUPTCY.

See EQUITY PLEADING AND PRACTICE, 9-12: FORECLOSURES, 12, 13.

ASSIGNMENT.

See BAIL BONDS, 3: EVIDENCE, 32: MORTGAGES, 7.

ASSIGNMENT OF ERRORS.

See PRACTICE IN SUPREME COURT, 7, 9, 17.

ATTACHMENT.

1. The statute as to service of writs of attachment from justice's courts contemplates personal service if defendant can be found in the county, and if not, then, as the next best mode, the leaving of certified copies at his last place of residence in the

- county, and finally, as a last alternative, service upon the person found in possession of the property; and the officer is bound to use diligence to secure the best service, and may not adopt an inferior one until, after reasonable diligence running through the time given for it, all superior modes are found impracticable.—*Town v. Tabor*, 262.
2. And when the constable's return shows that the only service made was by leaving the papers with the person found in possession of the property, and that such service was made at a time when there was still another day left within which the personal service, or service by leaving a copy at the last place of residence, etc., was available, the justice acquires no jurisdiction to proceed with the case.—*Ibid.*
 3. And an offer to amend such return by parol evidence that the writ was not in fact handed back into the justice's office by the constable until its return day, and that in the interval between such service as he did make and the return day he was unable to find the defendant, if competent, does not go far enough to cure the defect, in the absence of any proposal to show also that he acted under the writ in the meantime, and sought and was unable to find the defendant or his last place of residence in the county.—*Ibid.*
 4. In all cases the return of service should inform the court that lawful service has been made.—*Ibid.*
 5. The fact that the copy writ of attachment served was not certified by the officer, where it is in fact a true copy, and where it is accompanied by a copy of the inventory of property attached, duly certified, does not render the service invalid, the defect being purely formal.—*Leonard v. Woodward*, 514.
 6. An affidavit for a writ of attachment, which states positively the amount due over and above all legal set-offs, is not objectionable for want of the qualifying words "as near as may be;" the affiant states the sum as near as may be when he states it exactly.—*Grover v. Buck*, 519.
 7. It is not open to one whose goods have been taken upon an attachment, to object, when the attachment proceedings come collaterally in question, that the appraisers were members of his own family and consequently not disinterested, not freeholders, and were not sworn, where, though personally served and not shown to have been ignorant of the facts, he made no such objection in the attachment suit, the return averring that the appraisers were disinterested freeholders, and duly sworn; the statutory requirement of disinterested freeholders as appraisers is for his protection, and it cannot be presumed members of his family have an interest adverse to his.—*Ibid.*

8. The fact that no levy is endorsed on an attachment is immaterial where the sheriff's return upon the writ recites a levy and is accompanied by the appraisal.—*Ibid.*
9. In case of an attachment of a growing crop, constructive possession is all that is required or contemplated by the statute; and the provision for a bond is applicable and appropriate as a protection against removal when in its ripened condition the crop shall have become fit for removal.—*Ibid.*
See DAMAGES, 5: LEASE: REPLEVIN, 3.

ATTORNEY AND CLIENT.

See REPLEVIN, 5.

ATTORNEY GENERAL.

See EQUITY JURISPRUDENCE, 13: EQUITY PLEADING AND PRACTICE, 14.

ATTORNEYS OF RECORD.

See PRACTICE IN SUPREME COURT, 8.

ATTORNMENT.

See RENTS, 4, 5.

AUDITOR GENERAL.

See COUNTY TREASURERS, 1-3.

AUTHORITY.

See AGENCY, 1-4: CONTRACTS, 18: CORPORATIONS, 1-4: DEEDS, 5: DIRECTORS OF THE POOR: DOGS, 3: EMINENT DOMAIN, 6: EVIDENCE, 20, 22, 33.

AUTHORITY TO SELL.

See PROMISSORY NOTES, 2-4.

AVERMENTS.

See EQUITY PLEADING AND PRACTICE, 12.

AWARDS.

1. Awards of arbitrators are to be liberally construed, and require only such degree of definiteness as is sufficient to uphold a contract; and all presumptions are to be made in favor of their validity.—*Bush v. Davis*, 190.
2. An award will not be deemed void on the ground of failure to find the amount due at its date, where all the elements are

found and set forth so that it is a matter of the simplest computation to determine the exact amount.—*Ibid.*

3. An award will not be disturbed for allowing interest at ten per cent., unless the record discloses that the allowance of such interest was beyond the scope of the submission; every reasonable intendment must be indulged in support of the award, and it is to be presumed to be within the submission unless the contrary expressly appears.—*Ibid.*

BAIL BONDS.

1. Under the statute (*Comp. L. 1871, § 5738*) requiring bail bonds for appearance to be executed to the officer making the arrest, a bond running to the under sheriff, when that officer made the arrest, is not thereby rendered invalid.—*Wilcox v. Ismon, 268.*
2. The failure to give bail pieces to the sureties on a bail bond, where they have waived their rights in the matter by not demanding them, will not prejudice the plaintiff in the action, nor invalidate the bond.—*Ibid.*
3. An assignment of a bail bond need not be under seal, in the absence of such a statutory requirement.—*Ibid.*
4. Such an assignment need not be made in the official character of the officer to whom the bond ran, the official character appearing in the bond itself; any assignment purporting to transfer the bond is sufficient.—*Ibid.*
5. The acceptance of a plea, and proceeding in the suit, is not a waiver of the right to proceed against the appearance bail.—*Ibid.*
6. In an action on a bail bond the judgment in the original suit is admissible in evidence, as fixing the measure of damages.—*Ibid.*
7. Sureties on appearance bail become liable on failure to put in special bail to the same extent that sureties on special bail would if special bail had been put in.—*Ibid.*
8. Neglect on the part of the plaintiff to proceed against the sheriff or his bail, does not discharge the appearance bail, the plaintiff having the option to proceed against the sheriff or to take an assignment of the bond for appearance.—*Ibid.*

BAIL PIECES.

See BAIL BONDS, 2.

BANKRUPTCY PROCEEDINGS.

See CONTRACTS, 6: EQUITY PLEADING AND PRACTICE, 9-12.

BANKS.

1. A bank sued by an adverse claimant to money deposited with it, is under no obligation, after having given the depositor timely notice of the proceedings and of the facts on which they are based, to make a strenuous and persistent defense, or to resort to any measures to prevent the cause being brought to trial according to the regular course of the court; the implied obligation of a bank to its depositor to protect the interests of the latter do not go beyond the requirement of good faith in refusing to surrender the moneys confided to its custody, except upon a lawful demand lawfully established.—*Detroit Savings Bank v. Burrows*, 153.
 2. Where the depositor and her attorney had ample notice of the bringing of a suit by another against the bank to recover the deposit, and her agent was present at the trial, failure by the bank to notify such depositor's attorney of the time of the trial, such notice not having been requested, is no breach of duty or evidence of negligence on the part of the bank.—*Ibid.*
 3. An omission to apply for a continuance until such depositor should be present to take part in the trial, is held, under the circumstances of this case, not to be negligence on the part of the bank.—*Ibid.*
 4. Nor was the failure to move for a new trial upon facts communicated after the verdict to the bank officers and attorney by the depositor's agent, who was present at the trial, negligence. The burden of the defense rested on the depositor and not on the bank, and if a new trial was to be moved for, the duty of taking the necessary steps was upon such agent, instead of awaiting the action of a mere custodian having no interest in the dispute.—*Ibid.*
 5. The failure to tax costs after judgment in the suit against the bank, and the statement of the plaintiff's attorney in his precept for execution that "the defendant preferred to have an execution, and both parties want it done at once," and the prompt payment of the judgment by the bank, are held not evidence of collusion between the parties to the suit.—*Ibid.*
 6. The query is suggested, but not decided, whether where moneys are deposited by one on an understanding with the banker that all orders drawn against the deposit are to be to the order of another, the ordinary relation of debtor and creditor is established between the depositor and the banker, or whether such deposit does not leave it open to be determined as a question of fact under all the circumstances whether the money was understood to be deposited to the use of the one or of the other, or for the joint use of the two who were to act in drawing it out.—*Ibid.*
- See PAYMENT, 1-3: PROMISSORY NOTES, 17.

BASIS OF RECOVERY.

See QUANTUM VALEBAT, 1-6.

BED OF STREAMS.

See NUISANCES, 3-5: RIPARIAN OWNERS.

BIDDING.

See ESTOPPEL, 1.

BIGAMY.

1. It is no defense to a charge of bigamy that the second marriage was one between a negro and a white woman, which is prohibited and made void by statute; for every bigamous marriage is void.—*People v. Brown*, 339.
2. It is the entering into the void marriage while a prior valid marriage exists, that constitutes the gist of the offense; and it cannot help matters any that there are two elements of illegality in the case, instead of one. It is no valid reason for relieving a person from the consequences of violating one statute, that the act of doing so violated also another.—*Ibid.*

BILL OF COMPLAINT.

See DIVORCE: EQUITY PLEADING AND PRACTICE, 3, 6-8, 14.

BILL OF EXCEPTIONS.

The statement in the bill of exceptions, that all the evidence is set forth, when it is manifest such is not the fact, is misleading and wrong.—*American Ins. Co. v. Woodruff*, 6.

BILL OF PARTICULARS.

Where suit is brought against an official treasurer for a balance claimed to be in his hands, and the bill of particulars enumerates a number of items as claimed to have been received by defendant, and then states that the specific demand sought to be recovered is a specified balance with interest, it is not error to permit plaintiff to question defendant as to sums received by him differing from those specified in the bill, where it is clear that no one is misled by it; the real purpose of a bill of particulars is to avoid a surprise at the trial by the bringing forward of unexpected claims.—*Mason v. Fractional School District, etc.*, 228.

See EVIDENCE, 36, 37.

BILLS TO QUIET TITLE.

See EQUITY JURISPRUDENCE, 11: EQUITY PLEADING AND PRACTICE, 13: ESTOPPEL, 7.

BILLS TO REDEEM.

See EQUITY PLEADING AND PRACTICE, 9, 10.

BLANK ENDORSEMENT.

See PROMISSORY NOTES, 2-6.

BONA FIDE PURCHASER.

See CHATTEL MORTGAGES, 2, 3: EQUITY PLEADING AND PRACTICE, 7: EVIDENCE, 12-15: MORTGAGES, 8: PROMISSORY NOTES, 1-6.

BONDS.

See ATTACHMENT, 9: BAIL BONDS, 1-8: COUNTY TREASURERS, 2, 3: EQUITY PLEADING AND PRACTICE, 5: ESTATES OF DECEASED PERSONS, 3-6: EVIDENCE, 36: JUSTICE'S COURTS, 1, 2: MORTGAGES, 9: REPLEVIN, 2.

BOOMING COMPANIES.

See NUISANCES, 3-5.

BOTH PARTIES IN DEFAULT.

See QUANTUM VALEBAT, 1-6.

BOUNDARY LINES.

See ESTOPPEL, 4.

BREACH.

See CHATTEL MORTGAGES, 8, 10.

BRIEFS.

See PRACTICE IN SUPREME COURT, 7.

BROTHEL.

See CONSIDERATION.

BUILDING CONTRACTS.

See CONTRACTS, 1-6.

BURDEN OF DEFENSE.

See BANKS, 1-4.

BURDEN OF PROOF.

1. Whenever between parties who are contending in any legal proceeding a particular issue is raised, either by formal pleadings or the regular prosecution of the controversy in matter of fact, he who in substance and effect, whatever the mere form, has the affirmative of that issue, and is in such position that if what is alleged on his side is not maintained his case will consequently fail, must certainly be bound to find evidence to support it, and of course a preponderance, if there be evidence on both sides.—*Stewart v. Ashley*, 183.
2. In general the burden of proof lies upon the party who seeks to support his case by a particular fact of which he is supposed to be cognizant; and one of the examples given is, that one who insists upon the continuance of infancy to defeat a new promise proved upon him at a given time, must prove that his nonage was still continuing at that time.—*Ibid.*
See EJECTMENT, 4; INSURANCE 7; PROMISSORY NOTES, 13.

CANVASS OF VOTES.

See REMOVAL OF COUNTY SEAT.

CAPIAS AD RESPONDENDUM.

An affidavit for a *capias ad respondendum* which charges clearly enough an unlawful conversion of the property of the plaintiffs, is held sufficient.—*Wilcox v. Ismon*, 268.

CARELESSNESS.

See PROMISSORY NOTES, 14-16.

CASE MADE BY BILL.

See EQUITY PLEADING AND PRACTICE, 3.

CASES IN MICHIGAN REPORTS CITED AND COMMENTED UPON.

	PAGE.
<i>Achey v. Hull</i> , 7 Mich., 430.	294
<i>Adams v. Bradley</i> , 12 Mich., 346.	224
<i>Allen v. McKibbin</i> , 5 Mich., 449.	381
<i>Attorney General v. Supervisors of Lake county</i> , 33 Mich., 289.	212
<i>Atwell v. Zeluff</i> , 26 Mich., 118.	174, 177
<i>Atwood v. Cornwall</i> , 25 Mich., 142.	108

	PAGE.
Baxter v. Spencer, 33 Mich., 325.	361
Begole v. McKenzie, 26 Mich., 470.	381
Bissell v. Starr, 32 Mich., 297.	115
Blackwood v. Brown, 29 Mich., 483.	6
Brown v. Thompson, 29 Mich., 72.	367
Buell v. Irwin, 24 Mich., 145.	152
Cary v. Hewitt, 26 Mich., 228.	361
Clark v. Adams, 33 Mich., 159.	322
Clay v. Pennoyer Creek Imp. Co., 34 Mich., 204.	300
Clement v. Comstock, 2 Mich., 359.	196
Comstock v. Howd, 15 Mich., 237.	339
Comstock v. Smith, 26 Mich., 306.	107
Conn. Mut. Life Ins. Co. v. State Treasurer, 31 Mich., 14.	136
Crawford v. Edwards, 33 Mich., 354.	13
Cummings v. Freer, 26 Mich., 134.	224
Dalton v. Laudahn, 27 Mich., 529.	424
Dann v. Cudney, 13 Mich., 239.	387
Davis v. Freeman, 10 Mich., 188.	233
Dayton v. Rounds, 27 Mich., 82.	28
DeMyer v. McGonegal, 32 Mich., 120.	272
Dermont v. Detroit, 4 Mich., 435.	129
Dunn v. Sutliff, 1 Mich., 24.	40
Elliott v. Miller, 8 Mich., 132.	372
Everts v. Beach, 31 Mich., 136.	348
Farmers' and Mechanics' Bank v. Bronson, 14 Mich., 369.	228
First National Bank v. Watkins, 21 Mich., 439.	3
Fitzhugh v. Barnard, 12 Mich., 104.	75
Flanders v. Chamberlain, 24 Mich., 305.	361
Gibbs v. Linabury, 22 Mich., 479.	122
Gilbert v. Kennedy, 22 Mich., 5.	51
Green v. Bennett, 23 Mich., 464.	150
Gugins v. Van Gorder, 10 Mich., 523.	391
Hagenbuch v. Howard, 34 Mich., 1.	20
Hanna v. People, 19 Mich., 316.	351
Hill v. Chambers, 30 Mich., 422.	493
Hogsett v. Ellis, 17 Mich., 351.	348
Holmes v. Hall, 8 Mich., 66.	424
Horton v. Saunders, 13 Mich., 413.	223
Hunter v. Parsons, 22 Mich., 96.	107
Jennison v. Parker, 7 Mich., 355.	93
Kearney v. Doyle, 22 Mich., 204.	331
Kroop v. Forman, 31 Mich., 145.	206
Larkin v. Saginaw County, 11 Mich., 88.	129
Lorman v. Benson, 8 Mich., 25.	295
Lucking v. Wesson, 25 Mich., 443.	361
Mandeville v. Comstock, 9 Mich., 536.	170
Marathon v. Oregon, 8 Mich., 372.	28

	PAGE.
Matter of Leddy, 11 Mich., 198.	291
McCormick v. Bay City, 23 Mich., 457.	114
Melster v. Birney, 24 Mich., 435.	387
Mich. Midland & C. R. R. Co. v. Bacon, 33 Mich., 466.	339
Miller v. Finley, 26 Mich., 254.	34
Mok v. Detroit B. & S. Co., 30 Mich., 511.	211
Mundy v. Monroe, 1 Mich., 68.	317
Munroe v. Eastman, 31 Mich., 283.	75
Nall v. Granger, 8 Mich., 450.	438
Ortman v. Green, 26 Mich., 209.	382
Palmer v. Williams, 24 Mich., 328.	75
Paul v. Detroit, 32 Mich., 108.	172
Payne v. Avery, 21 Mich., 524.	12
Pegg v. Bidleman, 5 Mich., 26.	516
People v. McDonald, 9 Mich., 150.	351
People v. Supervisors of Onondaga, 16 Mich., 254.	124
Perkins v. Spaulding, 2 Mich., 157.	438
Phoenix Ins. Co. v. Allen, 11 Mich., 501.	93
Pontiac v. Carter, 32 Mich., 104.	129
Power's Appeal, 29 Mich., 504.	208
Reed v. Drake, 29 Mich., 222.	391
Riopelle v. Gilman, 23 Mich., 33.	317
Rose v. Lewis, 10 Mich., 485.	94
Russell v. Sweezey, 22 Mich., 235.	459
Ryder v. Flanders, 30 Mich., 336.	389, 394
Scofield v. Lansing, 17 Mich., 437.	124
Scott v. Bush, 26 Mich., 418; 29 Mich., 523.	500
Shotwell v. Harrison, 22 Mich., 410.	69
Smith v. First National Bank, 17 Mich., 479.	3
Spear v. Hadden, 31 Mich., 265.	303
Stansell v. Corning, 21 Mich., 242.	63
Starkweather v. Martin, 28 Mich., 471.	151
Stevens v. Corbitt, 33 Mich., 458.	339
Stewart v. Carleton, 31 Mich., 270.	391
Summers v. Bromley, 28 Mich., 126.	223
Taft v. Stewart, 31 Mich., 371.	4
Thatcher v. West River Nat. Bank, 19 Mich., 196.	280
Truesdail v. Ward, 24 Mich., 117.	387
Underwood v. Waldron, 12 Mich., 73.	339
Vinton v. Peck, 14 Mich., 287.	26
Weimer v. Bunbury, 30 Mich., 216.	489
Welch v. Frost, 1 Mich., 30.	231
Wells v. Martin, 32 Mich., 478.	237
Westchester Fire Ins. Co. v. Earle, 33 Mich., 143.	508
Wilson v. Wagar, 26 Mich., 452.	136, 381
Wright v. De Groff, 14 Mich., 164.	392
Wright v. Wilson, 17 Mich., 192.	525

CASHIER.

See PROMISSORY NOTES, 17.

CASH VALUE.

See TAXATION, 7.

CAUSE OF ACTION.

See DECLARATION, 3, 4: PLEA, 3.

CERTIFICATES.

Of Appointment: See LETTERS OF GUARDIANSHIP, 2.

Of Appraisal: See REPLEVIN, 1.

Of Authentication: See DEEDS, 1, 2: EVIDENCE, 26.

Of Deposit: See PAYMENT, 1-3.

CERTIFIED COPY.

See ATTACHMENT, 5: EVIDENCE, 26.

CERTIORARI.

The statute (*Comp. L. 1871, § 5477*) providing that on *certiorari* such judgment as the right of the matter requires shall be rendered, disregarding technical omissions, imperfections or defects that do not affect the merits, technical questions of practice will not be considered where the plaintiff's own testimony clearly negatives his right of action.—*Burnham v. Van Gilder*, 246.

See EMINENT DOMAIN, 1.

CHANGE IN CIRCUMSTANCES.

See WILLS, 5.

CHANGE OF USE.

See EQUITY JURISPRUDENCE, 10: MILL DAMS, 3.

CHARGE TO THE JURY.

1. Instructions given in this case in response to an inquiry of the jury after they had retired for a time and returned into court again, are held to have been misleading and erroneous, in that they gave to a portion of the evidence on an immaterial matter a weight and influence to which it was not entitled.—*Linn v. Howell*, 102.
2. The charge to the jury must be considered and construed as a whole, in the same connected way in which it was given.

and upon the assumption that the jury did not overlook any portion, but gave due and equal weight to every part; and where the effect of defendant's negligence in signing papers has been once clearly and properly stated, it is not necessary to incorporate and repeat that instruction with every other portion of the charge upon which it has any bearing, unless it is apparent that otherwise the jury might be misled.—*Anderson v. Waller*, 113.

3. The refusal of the trial court upon request to put the case to the jury upon the testimony of a single witness, or to instruct them that if they believe such a witness their verdict should be for a particular party, is not error.—*Grand Rapids & Ind. R. R. Co. v. Judson*, 506.
4. A parol arrangement, whereby a man who had deeded land to his wife, reserving to himself by written contract the right of possession and to repurchase within five years, bargains to give up his right under such contract, is void under the statute of frauds; and a ruling to that effect is not made erroneous by the judge's adding incidentally that "if the arrangement amounted to any thing, it would make the wife tenant of the husband, which was impossible," such further remark being immaterial.—*Grover v. Buck*, 519.

See CONTRACTS, 21: EVIDENCE, 11-15: GOODS SOLD AND DELIVERED, 3: HIGHWAYS, 15: PRACTICE IN SUPREME COURT, 10, 11, 13: PROMISSORY NOTES, 13, 15.

CHARGE UPON THE LAND.

See MORTGAGES, 3.

CHARTER.

Of Saginaw City: See DIRECTORS OF THE POOR.

CHATTEL MORTGAGES.

1. A description of property in a chattel mortgage as "one Durm Bull, known as the Grinalls bull,—said bull is four years old and weighs about 2,400 pounds," is not open to the objection that it is so vague and indefinite as to prevent the mortgage when duly filed becoming constructive notice to a subsequent purchaser of the bull from the mortgagor.—*Walley v. Snyder*, 60.
2. The statute (*Comp. L.*, § 4706), which makes an unrecorded chattel mortgage void against "subsequent purchasers or mortgagees in good faith," is intended to protect those only who have acquired rights such as would render them liable to be defrauded but for this protection against instruments of which they had no notice when they obtained their rights.—*Kohl v. Lynn*, 360.

3. A purchaser who has paid nothing does not come within this protection, and no one can be protected as a *bona fide* purchaser except to the extent of his payments made before notice.—*Ibid.*
4. A chattel mortgage does not transfer the legal title until after foreclosure or something equivalent thereto, which must usually be by a sale; and the proceeds of sales by the mortgagee are to be treated as moneys collected to apply on the security, and do not belong to the mortgagee beyond the extent of his lawful claim as a creditor.—*Ibid.*
5. A chattel mortgage of a stock of goods, giving the mortgagor authority to sell at retail in the ordinary course, and which required him to keep up his stock of like goods to a specified amount as security to the mortgagee, and to keep the stock insured for his benefit, and was worded to cover, in addition to the goods therein specifically described, all the stock the mortgagor should have from time to time in trade, is held valid, in the absence of any intervening paramount rights of third persons, to authorize the mortgagee to seize and subject to sale goods purchased and added to the stock subsequent to the giving of the mortgage.—*Leland v. Collier*, 418.
6. It is competent for parties to make contracts of agency, bailment, or other authority, as broadly as they choose, where no legal policy and no paramount right intervenes before their enforcement; and trusts in personal property, where the specific property is constantly changing while the fund remains subject to the duties and burdens of the trust, are not uncommon.—*Ibid.*
7. This trust or power attaches with like force to the property in the hands of purchasers thereof from the mortgagor subject to the terms and conditions of the trust agreement, as well as to additions made by them to the stock, as it would as between the original parties; every such purchaser becomes in equity a trustee of the fund.—*Ibid.*
8. Where in such a mortgage the covenants to keep up the stock and to insure are united, and it is provided that "a breach of these two covenants shall cause the whole sum secured to become due and payable," but the defeasance expressly authorizes a foreclosure on a breach of either, it is held, construing the mortgage as a whole, that a double breach is not essential to the right to foreclosure.—*Ibid.*
9. A ruling that a waiver of the condition, that a sale except at retail without written consent would operate as a forfeiture, could not be found unless the jury should find the property was sold with the knowledge and consent of the mortgagees, is held not to be an error of which parties standing in the place of the mortgagor can complain.—*Ibid.*

10. Where there is a covenant to insure in a mortgage, and it is not kept, the mortgagee may very properly insure, and he can add the premium to his debt, if fair and reasonable.—*Ibid.*
See DESCRIPTIONS OF PROPERTY, 1, 2: REPLEVIN, 6.

CIRCUIT COURTS.

See PRACTICE IN CIRCUIT COURTS: SUPERIOR COURT OF DETROIT, 2, 3.

CIRCUMSTANTIAL EVIDENCE.

See INSURANCE, 4.

CITY AGENTS.

See DETROIT HOUSE OF CORRECTION, 2.

CITY IMPROVEMENTS.

See LEGISLATIVE ACTION, 1-3.

CLAIM BY THIRD PERSON.

See BANKS, 1-6.

CLAIMS.

See ESTATES OF DECEASED PERSONS, 1, 2.

CLIENTS.

See REPLEVIN, 5.

CLOUD UPON TITLE.

See EQUITY JURISPRUDENCE, 9: VOLUNTARY PAYMENT, 1-4.

COLLAR.

See DOGS, 4.

COLLATERAL ATTACK.

See JUSTICE'S COURTS, 3.

COLLATERAL SECURITIES.

See DECLARATION, 1, 2: PAYMENT, 1-3: PROMISSORY NOTES, 7-12, 18.

COLLECTORS.

See COUNTY TREASURERS, 2, 3.

COLLUSION.

See **BANKS**, 5.

COMMISSIONERS.

See **EMINENT DOMAIN**, 1: **ESTATES OF DECEASED PERSONS**, 1:
HIGHWAYS, 1-8, 14: **LEGISLATION**, 1, 2.

COMMON COUNCIL.

See **LEGISLATIVE ACTION**, 1-3.

COMMON COUNTS.

See **DECLARATION**, 1, 2: **GOODS SOLD AND DELIVERED**, 1, 2.

COMMON-LAW PROCEEDINGS.

See **WRIT OF ERROR**, 1, 2.

COMMON RIGHTS.

See **ACTION ON THE CASE**.

COMMON USE OF COMMON RIGHT.

See **EQUITY JURISPRUDENCE**, 14, 15.

COMPARISON.

Of **Handwriting**: See **EVIDENCE**, 4-6. See **PROMISSORY NOTES**, 16.

COMPENSATION.

See **EQUITY PLEADING AND PRACTICE**, 8.

COMPENSATIONS.

See **CONTRACTS**, 3.

COMPETENCY.

See **INDIAN TREATY**, 1-3.

COMPETING BOOMING COMPANIES.

See **NUISANCES**, 4, 5.

COMPLAINANTS.

See **EQUITY PLEADING AND PRACTICE**, 4, 14.

COMPLAINTS.

See **CRIMINAL EXAMINATIONS**, 2: **RAPE**.

COMPLETION.

See CONTRACTS, 14: FINDING OF FACTS, 3.

COMPROMISES.

See GOODS SOLD AND DELIVERED, 2: SETTLEMENTS, 1, 2.

COMPUTATION.

See PRACTICE IN SUPREME COURT, 15.

CONCESSIONS.

See PRACTICE IN CIRCUIT COURTS, 3.

CONDEMNING LANDS.

See EMINENT DOMAIN, 5-7: HIGHWAYS, 1-3.

CONDITIONS.

See CHATTEL MORTGAGES, 9: CONTRACTS, 14: FINDING OF FACTS, 3: INSURANCE, 7, 9, 10: INTEREST, 1.

CONFIDENTIAL RELATIONS.

See REPLEVIN, 4.

CONFLICT.

See DESCRIPTION OF PROPERTY, 3.

CONSENT.

Of Supervisors: See EMINENT DOMAIN, 4. See CHATTEL MORTGAGES, 9.

CONSIDERATION.

A recovery in a court of justice for services performed in aid of prostitution, as mistress of a brothel, etc., is not permissible; such services have no value whatever in law.—*Williams v. Garde*, 82.

See CONTRACTS, 15: DEEDS, 5: EQUITY PLEADING AND PRACTICE, 6: EVIDENCE, 24.

CONSTABLE.

See REPLEVIN, 3: SEARCH WARRANT, 1-3.

CONSTITUTIONAL LAW.

See EMINENT DOMAIN, 4, 6: HIGHWAYS, 4: TAXATION, 3, 7.

CONSTITUTION CONSTRUED.

	PAGE.
Art. VI., § 5: Rules of Court, ...	430
Art. X., §§ 6, 9, 11: Supervisors: highways: bridges, . . .	48
Art. XIV., §§ 11, 12: Taxation: assessments: value, . . .	276
Art. XVIII., § 4: Navigable streams: dams: supervisors, . . .	208, 298

CONSTRUCTION.

See AWARDS, 1, 3: CHARGE TO THE JURY, 2: CONTRACTS, 14:
 DESCENT OF PROPERTY, 1-4: DOGS, 1, 3, 4: EMINENT
 DOMAIN, 2: EVIDENCE, 11, 16, 27: FINDING OF FACTS, 3:
 FRAUDULENT PROCUREMENT OF SIGNATURE, 1, 2: INDIAN
 TREATY, 1-3: INSURANCE, 9, 10: LEASE: LEGISLATION, 1, 2:
 LOG-LIEN LAW: MILL DAMS, 2, 3: PRACTICE IN SUPREME
 COURT, 5: REPAIRS: SPECIAL QUESTIONS TO THE JURY, 2-4:
 SUPERIOR COURT OF DETROIT, 4: SWAMP LANDS, 1-3: TAX-
 LIENS: WILLS, 1-6.

CONSTRUCTIVE NOTICE.

See MORTGAGES, 5, 6.

CONSTRUCTIVE POSSESSION.

See ATTACHMENT, 9: RIGHT OF POSSESSION, 1, 2: TRESPASS, 3.

CONTINUANCE.

See BANKS, 3.

CONTINUANCE OF INFANCY.

See BURDEN OF PROOF, 2.

CONTINUED EFFICACY.

See FORECLOSURES, 9.

CONTINUING FUND.

See CHATTEL MORTGAGES, 5-7.

CONTRACT PRICE.

See QUANTUM VALEBAT, 3.

CONTRACT RELATIONS.

See AGENCY, 1.

CONTRACT RIGHTS.

See REPLEVIN, 3.

CONTRACTS.

1. It is competent for the parties to a building contract in writing, which provides for payment only in cash, to afterwards agree orally that the amount of a note made by the builder and held by the other party should be paid thereon by delivering up and cancelling the note, and thereafter, as soon as work enough is done under the contract to pay such note, the note in the hands of such holder would thereby be satisfied; and if the note was not due when the work was completed, the new agreement would operate to extend the time of payment on the building contract until the note matured, and the builder could not in the meantime maintain an action for the money due upon the contract; nor could he, by suspending work on his contract, defeat this new agreement to the extent of the money earned.—*Roberts v. Wilkinson*, 129.
2. One who by his contract is to receive payment in something else than money, cannot, where he has broken his contract, sue upon the *quantum meruit* and recover the value of the labor performed under the contract and thereby convert into cash payments what, according to his agreement, is payable in something else; the express contract is not to be disregarded in such case.—*Ibid.*
3. An agreement thus to apply money earned to the extinguishment of an obligation to the employer is one which executes itself and does not require the formality of passing the money back and forth; but these compensations, when they fairly and properly occur, are reciprocal payments.—*Ibid.*
4. Where the holders of an endorsed note which they have thus agreed to turn on their contract with the maker, have informed the endorser that work enough had been done on such contract to satisfy the note, they are bound by this statement, and in their suit upon the note against such endorser, they will not be permitted to show that the endorser lost nothing by reason of his relying upon such statement.—*Ibid.*
5. Nor would the fact that such endorser may have had security from the maker for his endorsement, make any difference in his right to hold plaintiffs to their representations in this regard.—*Ibid.*
6. Bankruptcy proceedings instituted against the maker of the note after he had abandoned his contract with plaintiffs, he not being a party to the suit on the note, were not admissible in evidence and could not affect the rights of the endorser if the note had already been paid.—*Ibid.*
7. Where K and S have both had conversations with G whereby an oral arrangement was made for the use of a banking ground, and there was nothing in any of the negotiations to

- indicate that any one but K was the party in interest, K, when sued for the price of such use, will not be at liberty to defend on a showing that by a private agreement between him and S, the latter was to bank and move K's logs, and was bound to furnish the banking ground himself.—*Kimberly v. Guilford*, 259.
8. In an action for the value of logs belonging to plaintiff which defendant had taken and sawed and afterwards agreed to pay for, the defendant was held not at liberty under the circumstances of this case to justify his taking by a showing that certain other logs which had previously been mutually agreed on as plaintiff's logs,—each having by mistake cut over the line and upon the other's land,—and which plaintiff thereupon had taken and run down the stream, were in fact defendant's logs, no such claim having been made at the time of the taking or the promise to pay for the logs in suit, and no offer having been made to reimburse plaintiff for the expense of running the logs now claimed by defendant.—*Ibid.*
 9. It can make no difference in the liability of a party under his written contract that he never read the contract, where it does not appear that he was deceived or misled as to its contents, or that he objected to its terms.—*McEwan v. Orman*, 325.
 10. It is not competent in defense to a promissory note given for a part of the price named in a written contract for the purchase of lands, to show that the parties to the land contract had an oral arrangement at the time the note and contract were made, that the purchaser was to have the option of retaining the contract and paying the note, or surrendering the contract and thereby discharging his liability on the note; this would be to import into a written contract a verbal stipulation quite inconsistent with its terms.—*Ibid.*
 11. Such a case has no resemblance to those in which parol evidence is admitted to explain the purposes for which property has been transferred as a security by a conveyance absolute on its face.—*Ibid.*
 12. But, moreover, such a stipulation as was here sought to be shown would be void under the statute of frauds unless in writing, so that the offer was not merely to show by parol a change in the terms of a written contract, but to show such an agreement as could not under any circumstances have been made by parol.—*Ibid.*
 13. An agreement to surrender or release a parcel of land mentioned in a contemporaneous contract is not a defeasance, but an agreement for a resale, and as clearly within the statute of frauds as an agreement to transfer any other parcel.—*Ibid.*
 14. A ruling that the word "completed" in such a contract as

- the one in suit here has a different meaning from that it has in a contract for the construction of the road, is held not error; the purpose of such a condition, when embodied in a contract made in aid of the road, is accomplished when the road is put in a condition for regular business.—*Tower v. Detroit, L. & L. M. R. R. Co.*, 328.
15. A release by a wife of a dower and homestead interest is a valuable consideration and sufficient to support a lawful contract.—*Farwell v. Johnston*, 342.
 16. A contract to convey a parcel of land to a wife, in consideration of her joining her husband in a deed of a homestead, and thereby releasing her dower and homestead rights, is held taken out of the statute of frauds by performance, when the deed has been fully executed and delivered.—*Ibid.*
 17. The contract in question, providing that the logs shall be "No. 1 and 2 in quality and free from defects, and are at least to run twenty-five per cent into the upper qualities," and be "scaled as fast as banked, by some person to be mutually agreed upon," is held not to empower the scaler to go into the percentage and to conclude the parties in that respect by his scale.—*Chapman v. Dease*, 375.
 18. An agent whose authority rests in parol cannot bind his principal by an oral contract for the purchase of land.—*Colgrove v. Solomon*, 494.
 19. Where in defense to an action for money had and received an oral arrangement is set up to accept in payment a deed of land, which arrangement was afterwards repudiated when performance was tendered, rulings designed to make the case turn upon the rescission by the plaintiff of the alleged arrangement are inappropriate, the real basis of the plaintiff's action being the lack of any binding contract to accept payment in land.—*Ibid.*
 20. The payment in part in money of an existing debt, in pursuance of an arrangement to accept payment partly in money and partly in land held by a third person, and a discharge by the debtor of a mortgage he held against the land in question, cannot operate as a part performance of an oral contract to accept the land as payment, such as to take the case out of the statute of frauds; such part payment was but payment of so much of an existing debt, and the discharge of the mortgage was not a fact of part performance at all, but merely a preparatory act to put the vendor in condition to tender performance.—*Ibid.*
 21. An arrangement between father and son for an immediate and actual transfer of personal property by the former to the possession and control of the latter, in consideration of his undertaking to support and to provide for his parents, will

warrant the son, if he has performed on his part, in detaining and claiming title to the property upon his father's death, and as against the administrator; and in a controversy over the title between such son and administrator, there being evidence tending to establish such an agreement and performance, it is held error to put the case to the jury as one involving a promise of a testamentary gift, instead of a present sale.—*Chambers v. Hill*, 523.

See CHARGE TO THE JURY, 4: CHATTEL MORTGAGES, 5-10: CORPORATIONS, 1-4: DAMAGES, 2-4: DEEDS, 4: EQUITY JURISPRUDENCE, 5-7: EVIDENCE, 1, 24, 34: LEASE: PRINCIPAL AND SURETY: PROMISSORY NOTES, 16: QUANTUM VALEBAT, 1-6.

CONVERSATIONS.

See EVIDENCE, 41-44.

CONVERSION.

See CAPIAS AD RESPONDENDUM: DAMAGES, 5.

CONVEYANCES.

See DEEDS: EVIDENCE, 14, 15.

COPY.

See ATTACHMENT, 5: EVIDENCE, 7: PROMISSORY NOTES, 1.

CORPORATE ACTION.

See CORPORATIONS, 1-4.

CORPORATE EXISTENCE.

See PLEA, 2.

CORPORATIONS.

1. It is not within the implied powers of any corporate officer to obligate the corporation to an increase of the capital stock by an agreement with an employe that he should receive stock in payment for his services, when the corporation held no stock.—*Finley Shoe and Leather Co. v. Kurtz*, 89.
 2. The law permits an increase of capital stock only by the body of corporators specially convened for the purpose; that which the law prohibits directly may not be done indirectly.—*Ibid.*
 3. An undertaking by all the stockholders severally on its behalf does not bind the corporation; where joint action is required by law, individual action is of no avail.—*Ibid.*
 4. There can be no contract without mutuality; and a corporation can only be bound by corporate action.—*Ibid.*
- See EVIDENCE, 33: PLEA, 2: PRACTICE IN CIRCUIT COURTS, 1.

CORPORATORS.

See CORPORATIONS, 1-4.

CORRESPONDENCE.

See EVIDENCE, 11-15.

CORROBORATION.

See EVIDENCE, 18.

COSTS.

See BANKS, 5: EQUITY JURISPRUDENCE, 9: JUSTICE'S COURTS,
1, 2: PRACTICE IN SUPREME COURT, 6.

CO-TENANTS.

See RENTS, 1, 6, 7.

COUNSEL.

See PRACTICE IN SUPREME COURT, 8.

COUNTER DEMANDS.

See CONTRACTS, 3.

COUNTY SEAT.

See REMOVAL OF COUNTY SEAT.

COUNTY TREASURERS.

1. The provision of the tax law (*Comp. L. 1871, § 1034*) requiring the county treasurer to forward by the first day of March to the auditor general certified lists of lands returned as delinquent for unpaid taxes, which the auditor general is authorized to receive at any time during the month of March, is manifestly intended to serve as a guide in matter of time only in the ordinary cases where no extension of time for the collection of taxes is granted; and the requirement as to time, if in any view mandatory, in case of no extension, does not touch cases where extensions are allowed; and in such cases the county treasurer is only required to forward such lists promptly on receiving the proper returns from the collectors. — *Supervisors of Houghton County v. Rees, 481.*
2. In an action to charge the county treasurer on his bond with failure of duty in not forwarding to the auditor general lists of delinquent tax lands, it is incumbent on the plaintiff to show, not merely that returns of such lands were in fact made

- by the collectors to the treasurer, and that no transcripts were received from him by the auditor general up to April 1st, but also that the transcripts were not forwarded within a reasonable time after actual return to the treasurer by the collectors.—*Ibid.*
3. The law having made the action of the collectors a necessary preliminary to that of the county treasurer, due performance on their part will not be presumed, in the absence of evidence, in order to charge him with having failed to perform duly; the presumption of official regularity applies with equal force to each.—*Ibid.*

COURT RULES.

See SUPERIOR COURT OF DETROIT, 1-4.

COVENANT TO INSURE.

See CHATTEL MORTGAGES, 10.

CREDIT.

See AGENCY, 1-4.

CREDITORS.

See PARTNERSHIP, 1-4: PROMISSORY NOTES, 7.

CREEKS.

See EMINENT DOMAIN, 2.

CRIMINAL COMPLAINTS.

See FALSE IMPRISONMENT, 1-3.

CRIMINAL EXAMINATIONS.

1. The examination of persons charged with offenses not cognizable by a justice of the peace, was designed to take the place of a presentment by the grand jury, but it was not designed thereby to deprive the accused of any substantial right that existed before.—*Yaner v. People*, 286.
2. In making the complaint and in the examination of witnesses previous to the issuing of the warrant, the proceedings are not only *ex parte*, but general, and not confined to any particular offense, but the warrant must specify some particular offense, and the proceedings thereafter become specific and limited by the offense charged in the warrant.—*Ibid.*
3. Where the offense charged in the warrant includes one or more others of lesser degree, the magistrate should determine

- which offense, if any, has been committed, to the end that the accused may not be put upon trial for an offense different or greater than that for which he had been examined and held for trial.—*Ibid.*
4. The examining magistrate is not to be required to nicely weigh evidence as a petit jury would, nor to discharge the prisoner where there is a conflict of evidence, or in case of a mere reasonable doubt of his guilt; and his inquiry may extend to all the facts connected with the charge, though they show an offense different or greater than that charged; but if it appear that a higher or different offense has been committed, a new warrant should thereupon be issued charging the proper offense, upon which an examination may be had.—*Ibid.*
 5. The magistrate must, however, upon the examination of the whole matter, determine whether an offense has been committed, and he must at the same time specify it, so that it may be seen whether it is an offense bailable by him or not.—*Ibid.*
 6. Where upon examination under a warrant charging the offense of murder, the magistrate refused upon request to determine whether the evidence adduced showed probable cause to believe the offense committed was murder or only manslaughter, and his return affirmatively showed such request and refusal, an information for murder having been filed, it was held that a motion to quash on this ground ought to prevail.—*Ibid.*

CRIMINAL LAW.

See CRIMINAL EXAMINATIONS, 1-6: FALSE IMPRISONMENT, 1-3: FRAUDULENT PROCUREMENT OF SIGNATURE, 1, 2: INFORMATION: PRISONS: RAPE: SEARCH WARRANT, 1-3.

CROPS.

See DEEDS, 4.

CROSS-EXAMINATION.

See EVIDENCE, 19, 20, 30: RAPE.

CRUELTY.

See DIVORCE.

CULVERTS.

See LEGISLATIVE ACTION, 1-3.

CUMULATIVE REMEDY.

See JUSTICE'S COURTS, 2.

CURATIVE ACT.

See HIGHWAYS, 15.

CUSTODIAN.

See BANKS, 1-6: DETROIT HOUSE OF CORRECTION, 2.

CUSTODY OF THE LAW.

See GARNISHMENT: SEARCH WARRANT, 3.

DAMAGES.

1. The amount saved by the city by letting a new contract to complete the work is not the test of the amount equitably due to the prior contractor for work done and materials furnished under a contract he failed to complete.—*Michigan Paving Co. v. Common Council of Detroit*, 201.
 2. The measure of damages for the breach of a contract to transport from one market to another an ordinary article of merchandise always to be found in the market, is the excess in value at the place of destination at the time when by the contract the merchandise should have arrived there, beyond its value at the place of shipment, with the agreed freight added and such expense as under the contract the shipper would have incurred in loading and unloading, etc., had the contract been performed.—*Ward's Central & Pacific Lake Co. v. Elkins*, 439.
 3. On breach of a contract to carry by vessel an ordinary article of merchandise, the shipper will not be justified in procuring shipment by rail if the railroad prices would render it unprofitable. A person has no right to put others to an expense of such a nature as he would not as a reasonable man incur on his own account.—*Ibid.*
 4. In case of an article of specific utility for preservation, where the circumstances are such as to justify employing any transportation which is accessible, and to render the difference in cost in transportation a proper measure of damages, the shipper is bound to seek other means of carriage immediately at hand, and is not permitted to await his leisure and speculate on future chances by making piecemeal shipments.—*Ibid.*
 5. In an action by the sheriff against parties who have converted to their own use a growing crop upon which he had levied an attachment, the judgment in the attachment suit, though rendered after the conversion, is admissible in evidence to show the amount of the plaintiff's lien.—*Grover v. Buck*, 519.
- See QUANTUM VALEBAT, 1-6.

DAMS.

See EMINENT DOMAIN, 4-7.

DATE.

See EVIDENCE, 28.

DEALINGS.

Between decedent and son: See EVIDENCE, 40-44.

Between employer and employe: See EVIDENCE, 32.

Of individual members: See PARTNERSHIP, 3, 4.

With client: See REPLEVIN, 5.

DEATH.

See FORECLOSURES, 12, 13; INSURANCE, 3, 4.

DEBTOR.

See BANKS, 6; PROMISSORY NOTES, 7-12.

DEBTS.

See ESTATES OF DECEASED PERSONS, 6.

DECEIT.

See PROMISSORY NOTES, 14-16.

DECLARATION.

1. Where one has deposited with another securities to indemnify the latter for signing as a surety the former's bond to pay and satisfy certain mortgages, he may, after performance of the condition of the bond, recover under the common counts the moneys collected on the securities; there is no more occasion for declaring specially on the contract than there would be for setting forth the special circumstances in other cases where one is wrongfully detaining the property of another.—*Blackwood v. Brown*, 4.
2. One who has received securities to protect him for having signed another's bond to a third person, conditioned that the obligor should procure a discharge of certain mortgages on lands conveyed by him to the obligee, cannot, when called upon after performance to refund, set up in defense any technical objections to the discharges procured, where they were satisfactory to the party for whose benefit they were obtained and he has delivered up the bond as satisfied.—*Ibid.*
3. The declaration in this cause, which seeks a recovery of the amount of a note of a third person which it is claimed defendant passed to plaintiff under fraudulent representations as to its value, is held lacking in the substantial matters

essential to make out such a cause of action, or any other.—*Staflet v. Marker*, 313.

4. The objection that the declaration fails to state any cause of action is not waived by pleading to the merits instead of demurring; but the point may be made by an objection to the introduction of any evidence.—*Ibid*.
5. A declaration against two defendants, on common counts with promissory note appended, purporting to be signed in a firm name, is not open to demurrer for a failure to aver that defendants are partners.—*Danaher v. Hitchcock*, 516.
6. The omission of the venue in a declaration is not, under our statute (*Comp. L. 1871, § 6193*), a demurrable defect.—*Ibid*. See GOODS SOLD AND DELIVERED, 1, 2: PLEA, 3: REPLEVIN, 1: TRESPASS, 1, 2.

DECLARATIONS.

See EVIDENCE, 38, 41.

DECREE.

See DIVORCE: EQUITY JURISPRUDENCE, 9: EQUITY PLEADING AND PRACTICE, 2, 3, 5: FORECLOSURES, 7, 11-13.

DEDICATIONS.

See ESTOPPEL, 5.

DEEDS.

1. A seal is essential to a certificate of authentication of due execution of a deed executed in another state, to entitle the deed to be recorded under the statute of 1840.—*Pope v. Cutler*, 150.
2. This case and *Starkweather v. Martin*, 28 Mich., 471, are held to be distinguishable.—*Ibid*.
3. It is no valid objection to the admission in evidence of a deed to the plaintiff from one who is shown to have been sole heir of the grantor in a previous deed, in plaintiff's chain of title, which was defective, that such later deed recited that it was given to supply the defect in the prior deed, and that such prior deed had not been produced and proved; the recital did not detract from the force of the later deed, and if the prior deed was valid, plaintiff had the title through it, and if not, then the later deed transferred it.—*Boyce v. Stambaugh*, 348.
4. One who has agreed to accept in payment of a specified debt a deed of lands, with a reservation of possession in the grantor until the following October, is not bound thereby to accept a deed containing the additional reservation of all

crops growing thereon or produced before October; the right to sever and remove crops is distinct in its nature from the temporary privilege of retaining possession, and is not essential thereto, but of larger import.—*Colgrove v. Solomon*, 494.

5. A blank deed executed in a foreign state, containing no name of grantee, no consideration, and no description of property, and which came in that condition into this state, where the blanks for grantee, price and description of property were filled in by some one not shown to have authority, in writing or otherwise, from the grantor, in the hands of one having notice of the facts, can have no force or validity as a conveyance of title.—*Lindsley v. Lamb*, 509.

See EQUITY PLEADING AND PRACTICE, 13: EVIDENCE, 14, 15:
FORECLOSURES, 1-4: RENTS, 2-4.

DEFAULTS.

For want of plea: See PRACTICE IN SUPREME COURT, 18.

DEFEASANCE.

See CHATTEL MORTGAGES, 8: CONTRACTS, 13.

DEFECTIVE PLANS.

See LEGISLATIVE ACTION, 1-3.

DEFECTS.

In title: See FORECLOSURES, 7, 8. See LOG-LIEN LAW, 1-3.

DEFENDANT'S INTEREST.

See REPLEVIN, 7.

DEFENSES.

See BANKS, 1: CONTRACTS, 8: FORECLOSURES, 1-4: REPLEVIN, 3.

DEFINITENESS.

See AWARDS, 1: CHATTEL MORTGAGES, 1.

DEGREES.

See CRIMINAL EXAMINATIONS, 3-6.

DELAY.

See FORECLOSURES, 10: RAILROADS, 4, 5.

DELINQUENT TAX LISTS.

See COUNTY TREASURERS, 1-3.

DELIVERY.

Of possession: See FORECLOSURES, 8.

Of securities: See MORTGAGES 7, 8.

See EVIDENCE, 8.

DEMURRER.

See DECLARATION, 5, 6: EQUITY PLEADING AND PRACTICE, 2, 3, 6, 7.

DENYING EXECUTION.

See PRACTICE IN CIRCUIT COURTS, 2.

DEPOSITS.

See BANKS, 1-6.

DESCENT OF PROPERTY.

1. By the statute (*Comp. L. 1871, § 4309, Sub. 6*), where upon the descent of an estate to children, one of them dies under age, not having been married, his share of the inheritance goes to those who would have taken the same had such child died in the lifetime of the ancestor, *i. e.*, to the other children of the intestate, and to the issue of such thereof as may have died, by right of representation: the intent being rather to give a new destination to that portion of the parent's estate which has in some measure failed to accomplish the design of the legislature by the premature death of such child, than to provide a new and distinct rule of distribution for such child's own estate.—*Burke v. Burke, 451.*
2. This statutory provision applies only to estates inherited from the parent; and estates acquired by the minor from the parent in any other way than by inheritance, or acquired from any other source, are not affected by this provision, but are governed by the other statutory rules of descent.—*Ibid.*
3. In case of an apparent conflict between different subdivisions of the same section of the statute, the entire section must be examined, and such a construction put upon it as, if possible, will harmonize and give effect to the various provisions according to the evident intent, so far as the same may be gathered from the language used.—*Ibid.*
4. Construing the statute of descents (*Comp. L. 1871, § 4309*), it is held that the first five subdivisions seem to have reference

to and provide for the descent of the real estate of intestates generally, without reference to the manner in which, or source from whence the intestate acquired or derived his title; the sixth and seventh subdivisions go back to the source from whence the deceased minor intestate derived his title, and provide how in certain cases a minor's inherited estate shall descend; and the sixth subdivision is not a mere proviso to the fifth alone, but limits all the preceding subdivisions to which it is applicable, and was intended as an exception to the general plan before laid down.—*Ibid.*

DESCRIPTION.

See INFORMATION.

DESCRIPTION OF PROPERTY.

1. Written descriptions of property are to be interpreted in the light of the facts known to and in the minds of the parties at the time; and a subsequent purchaser or mortgagor is supposed to acquire a knowledge of all the attendant facts needful to his protection, and to purchase in view of that knowledge.—*Willey v. Snyder*, 60.
2. Descriptions do not identify of themselves, but only furnish the means of identification; they give certain marks or characteristics, or historical data or incidents, by the aid of which the thing intended may be singled out from all others, not by the description alone, but by that explained and applied.—*Ibid.*

See CHATTEL MORTGAGES, 1; DEEDS, 5; EQUITY PLEADING AND PRACTICE, 13; REPLEVIN, 1.

DETENTION.

See SPECIAL QUESTIONS TO THE JURY, 4.

DETROIT HOUSE OF CORRECTION.

1. The city of Detroit is not responsible for the misconduct of the officers of the Detroit house of correction towards the prisoners.—*Detroit v. Laughna*, 402.
2. Under the act of 1861, the government of the prison having been put under the control of a board of inspectors, and the common council having no voice in its internal management, or in the selection of its officers, other than the superintendent, whose powers and duties are all governed by the statute, the city cannot be regarded as custodian of the prison or as jailer and guardian of the prisoners; the officers are not city agents and the city has no means of directing or of checking their action under the law, and therefore cannot be liable for their doings.—*Ibid.*

DILIGENCE.

See RAILROADS, 4, 5.

DIRECTORS OF THE POOR.

The director of the poor under the charter of Saginaw City (whose powers, duties and liabilities are by express reference limited to those of like officers in townships) has no authority to bind the city by the employment of a physician to perform a surgical operation upon a pauper of the city at an agreed price of fifty dollars.—*Barber v. Saginaw City*, 52.

DISAPPEARANCE.

See INSURANCE, 5, 6.

DISCHARGE OF MORTGAGE.

See CONTRACTS, 20.

DISCLAIMER.

See APPLICATION OF PAYMENTS, 1.

DISCRETION.

See ESTATES OF DECEASED PERSONS, 2: EVIDENCE, 19, 24: HIGHWAYS, 4, 8: LEGISLATIVE ACTION, 3: PRACTICE IN CIRCUIT COURTS, 4.

DISEASE.

See INSURANCE, 11.

DISMISSAL.

See RAILROADS, 1-3.

DISTINCT ACTS.

See TRESPASS, 1, 2.

DISTINCT PAROL AGREEMENT.

See EVIDENCE, 1.

DISTINCT PROPOSITIONS.

See PRACTICE IN SUPREME COURT, 11.

DISTRIBUTION OF PAYMENTS.

See APPLICATION OF PAYMENTS, 3.

DISTRICT MONEYS.

See SCHOOL DISTRICTS, 1-3.

DISTRICTS.

See SCHOOL DISTRICTS: TAXATION, 5.

DIVORCE.

A bill for divorce which, in stating a case for divorce on the ground of adultery, avers the contracting by defendant of a venereal disease, will authorize a decree on the ground of extreme cruelty, where the proofs clearly substantiate the fact so averred.—*Canfield v. Canfield*, 519.

DOCKET ENTRY.

See EVIDENCE, 17.

DOCUMENTS.

See EVIDENCE, 2-6, 9-12, 16: INSURANCE, 3: PRACTICE IN SUPREME COURT, 5.

DOGS.

1. The statute (*Laws 1873, p. 483*) authorizing any person to kill any dog going at large and not licensed and collared, as provided by the act, is not to be extended by construction.—*Hetsrodt v. Hackett*, 283.
2. Dogs are property and have a value.—*Ibid.*
3. The authority given by this law to persons, cannot by construction be so enlarged as to embrace animals also; the statute contemplates the exercise of some judgment by the person, to determine before killing the dog whether it was properly licensed and collared, and can have no application and afford no protection to a case of killing by another dog.—*Ibid.*
4. If the owner has complied with the provisions of the act by having his dog properly licensed and collared, and by accident the collar is lost, a reasonable time must be allowed him to discover that fact and to replace the lost collar.—*Ibid.*

DONATION TO STATE.

See SWAMP LANDS, 1-3.

DOUBLE COVENANTS.

See CHATTEL MORTGAGES, 8.

DOWER.

See CONTRACTS, 15, 16: EJECTMENT, 5.

DUE BILLS.

See PARTNERSHIP, 2-4.

DUTY OF SHIPPER.

See DAMAGES, 2-4.

DUTY TO PAY OVER.

See INTEREST, 2.

EJECTMENT.

1. Where on a trial by the court without a jury written findings are requested, a judgment entered up before the findings are finally completed and filed, is premature and to be regarded as provisional action merely, which only becomes perfected when the findings are completed; and the time for taking a new trial in ejectment, as matter of right under the statute, should date from the day when judgment becomes thus perfected.—*O'Blinakie v. Judge of Kent Circuit*, 62.
2. Whether, where writ of error is sued out, the time of the pendency of the case in error is to be excluded, in computing time within which new trial in ejectment may be demanded as a matter of right under the statute:—*Quære?*—*Ibid*.
3. Where in an action of ejectment brought by two plaintiffs jointly, each claiming an undivided interest, after a trial and judgment in favor of one plaintiff and against the other, the cause had been treated as practically severed into two distinct suits, which were proceeded in separately, though without any order of severance or change of pleadings, one branch being taken by defendants to the supreme court for review and there affirmed, and afterwards a new trial under the statute procured and a trial and verdict had and judgment rendered and satisfied, an objection interposed by the defendants when the other branch was moved by the plaintiff who on the first trial had been defeated, that there was no proper case before the court for trial, is not sustained where both parties have united in treating the action as divided, and are alike responsible for the anomalous character the proceedings have assumed.—*Stewart v. Ashley*, 183.
4. In an action of ejectment brought by one who had been under guardianship as a minor, to test the validity of a sale by his guardian, the burden of proof upon the question whether the suit was brought within the prescribed time after the ma-

jority of the ward for bringing such suit, is upon the plaintiff.—*Ibid.*

5. Purchasers from an administrator having gone into possession under an understanding with the widow of decedent that they should have the occupation and enjoyment, not only in their own right, but also in her right as dowress, rendering to her a reasonable compensation by way of rent, such widow cannot maintain ejectment against them without first terminating the tenancy.—*Gustin v. Burnham*, 511.
See ESTOPPEL, 6, 7: RIGHT OF POSSESSION, 1, 2.

EJUSDEM GENERIS.

See INSURANCE, 9.

ELECTION.

See TRESPASS, 1, 2.

EMINENT DOMAIN.

1. In proceedings under the statute to condemn lands for improving the navigation of rivers, the order appointing commissioners to determine the necessity of the taking and to ascertain the damages, etc., is not interlocutory merely, but is final so far as any action by the court is concerned, and may be reviewed on *certiorari*.—*Clay v. Pennoyer Creek Improvement Co.*, 204.
2. The statute in question contemplates the improvement of navigable rivers, and not the creation thereof out of creeks and streams which in their natural state are in no sense navigable; and it is questionable whether it is applicable at all to streams strictly private, as such statutes are usually not to be enlarged by intendment.—*Ibid.*
3. The petition in such proceedings is jurisdictional, and must set forth all the facts necessary to show that the petitioning corporation is authorized to make the proposed improvement, and has taken all the necessary preliminary steps.—*Ibid.*
4. Such a petition, averring that the stream is a navigable one and that the improvements contemplated include three dams, must allege the obtaining of authority from the board of supervisors to make the same, as they alone under the constitution (*Art. XVIII, § 4*) can authorize the bridging or damming of navigable streams; and the allegation of the procurement of the assent of the governor and attorney general, and the approval of the board of control of the St. Mary's Falls Ship Canal, as required by the statute, does not suffice in this particular, but that requirement is an additional one.—*Ibid.*

5. The petition whereby proceedings are instituted to condemn lands for mill purposes under the statute (*S. L. 1873, p. 486*) should show affirmatively that the proposed dam will not injure any mill or mill site, above or below, on the same stream, this being a limitation expressly fixed by the statute upon the exercise of the right conferred.—*Fox v. Holcomb*, 298.
6. The constitution (*Art. XVIII, § 4*) inhibiting the damming of navigable streams, except by authority of the supervisors, the petition by which lands are sought to be condemned for the erection of a dam for mill purposes should show whether the stream is a navigable one or not, and if navigable, that the requisite permission has been obtained.—*Ibid.*
7. In such proceedings the petition is jurisdictional and should affirmatively allege every fact necessary to entitle the petitioner to make the desired improvement, and to enable the parties whose rights would be affected thereby to disprove the same.—*Ibid.*

See HIGHWAYS, 1-3, 14: RAILROADS, 1-3.

EMPLOYER AND EMPLOYEE.

See EVIDENCE, 32.

EMPLOYMENT.

See DIRECTORS OF THE POOR.

ENDORSEMENT.

See ATTACHMENT, 8: EVIDENCE, 8: PROMISSORY NOTES, 7-12, 17.

ENDORSERS.

See CONTRACTS, 4-6.

ENGINES.

See HIGHWAYS, 10-13.

ENTRY.

See RIGHT OF POSSESSION, 2.

EQUITABLE TITLE.

See EQUITY JURISPRUDENCE, 6.

EQUITIES OF PRIOR HOLDER.

See PROMISSORY NOTES, 5.

EQUITY JURISPRUDENCE.

1. Equity will not interfere by injunction to restrain the collection of a tax, where the complainant has an adequate remedy at law.—*Hagenbuch v. Howard*, 1.
2. A charge in the bill, that the supervisor acted fraudulently in making and in afterwards refusing to correct his assessment, will not confer jurisdiction in equity, where it does not further appear that adequate relief is not practicable in a court of law.—*Ibid*.
3. Where personal property sufficient in amount has been levied upon to satisfy a tax on bank stock, which is claimed to be illegal and void, the remedy at law is adequate; an action of trover for the value of the property seized would raise the question, or complainant might pay the amount of the tax under protest, and afterwards test the validity of the tax in an action to recover back the amount paid.—*Ibid*.
4. Equity will not interfere to restrain the collection of a tax upon personal property, the remedy at law being ample and plain.—*Mears v. Howarth*, 19.
5. A court of equity has no jurisdiction to enforce forfeitures; if the vendor in a land contract desires such relief he must seek it at law, or by entry for the breach of condition.—*Fitzhugh v. Maxwell*, 138.
6. A contract for the sale of land conveys to the vendee an equitable title, and the only principle upon which the vendor may sue for his money, and at the same time seek security against the land, is the one which recognizes the analogy to a vendor's lien in cases where the legal title has been conveyed; and the vendee's title can only be divested by a sale. There can be no such thing as a strict foreclosure of such a lien.—*Ibid*.
7. The claim of a vendor in a land contract is but an ordinary money debt secured by the contract, and his proceedings to enforce the lien upon the land should be governed by the analogies of proceedings to enforce other equitable liens, and be executed by a sale to satisfy the amount due.—*Ibid*.
8. An objection to a bill for specific performance, that it fails to aver the value of the lands to exceed one hundred dollars, is not sustained where it appears from it that complainants paid more than that sum.—*Raymond v. Shawboose*, 142.
9. Where, under a bill for specific performance, both parties have proceeded without objection upon a hypothesis that would make a subsequent deed given by the vendor to his co-defendants a cloud upon the title, the court, though holding such deed of no force, and that complainants' remedy at law was ample, affirmed the decree below requiring defend-

- ants to release to complainants, though without costs to either party.—*Ibid.*
10. A court of equity will not interfere to protect complainant from an injury that defendants can at any time make lawful if they choose; therefore a showing of a subsisting right of flowage for saw-mill or grist-mill purposes will prevent the abatement of a mill-dam erected to supply a paper mill and causing only the like extent of flowage.—*Hathaway v. Mitchell*, 164.
 11. Under the statute (*Comp. L. 1871, § 5072*), providing for filing bills to quiet title to lands, a complainant, whose grantors had purchased of the United States in 1852 a parcel of swamp land, and who is in actual possession thereof, may come into equity for protection against the claims of a defendant under a subsequent patent from the state, who has never been in possession.—*Dale v. Turner*, 405.
 12. A husband having transferred to his wife, pending divorce proceedings between them, certain village lots which the latter occupied as a home, a secret conveyance thereof from the wife back to the husband, made after judgment, and on the eve of execution, against the wife and in favor of her solicitor in said divorce proceedings, for the value of his services therein, is held, under the circumstances of this case, to be fraudulent and void as against the levy and sale on such execution.—*Smith v. Brown*, 455.
 13. An information in equity at the instance of the attorney general must necessarily be based upon a public grievance.—*Attorney General v. Ewart Booming Co.*, 462.
 14. Any injury resulting to one making use of a common right from the reasonable and prudent use by another of the like right, must be considered incidental to and inseparable from the exercise of a general right, and is not the subject of either public or private complaint.—*Ibid.*
 15. A careless or reckless exercise by one party of a public and general right, to the prejudice of another desiring to make use of the same right, and not affecting the general public, is a private injury and not a public wrong, and will not sustain an information on behalf of the state.—*Ibid.*
 16. A foreclosure by advertisement of one of two mortgages of even date, and designed to be simultaneous, would not be effectual to settle the relative rights of the foreclosure purchaser and the holder of the other mortgage; and a bill in equity would be necessary to determine such rights and to marshal the assets; and to do this a sale is necessary unless one of the parties shall take up the other's mortgage.—*Van Aken v. Gleason*, 477.

See ESTATES OF DECEASED PERSONS, 4-6: ESTOPPEL, 3: NUISANCES, 1-5.

EQUITY PLEADING AND PRACTICE.

1. An objection for want of parties, when not taken by any pleading, but raised for the first time at the hearing, will not prevail unless the defect be one that precludes a decree that will do justice as between the parties and fully determine the controversy.—*Miller v. Thompson*, 10.
2. A decree entered immediately upon the overruling of a demurrer to the bill is premature and irregular; the proper practice in such case is to grant defendant leave to answer, and upon his failure within the time granted to answer, then to enter final decree.—*Creasey v. St. George's Society of Detroit*, 51.
3. The bill being so uncertain and indefinite as to be demurrable on that ground, and the decree being broader than was warranted by the bill, a reversal is ordered, and the record remanded for further proceedings.—*Ibid.*
4. Separate tax-payers may join as complainants in a bill to enjoin the collection of an invalid tax upon lands.—*Bristol v. Johnson*, 123.
5. Where complainants in an injunction bill have been required to file a bond to pay the judgment which they sought to stay, in case they should fail to invalidate it the final decree dismissing the bill may properly require payment of the judgment.—*Hatheway v. Weeks*, 237.
6. On general demurrer to a bill in equity, general allegations of matters merely going to make up a completed consideration are good enough, though it is more correct pleading to set them out specifically.—*Farwell v. Johnston*, 342.
7. A bill by the wife for specific performance of a land contract, to which a third person, to whom defendant has conveyed, is made a party, which avers that complainant is in possession, and indirectly that such third person knew her equities, is not open on general demurrer to the objection that it fails to allege that he lacked the qualities of a *bona fide* purchaser.—*Ibid.*
8. A bill which prays for specific performance as the primary remedy and for compensation as alternative relief merely, is not subject to the objection that it is filed for compensation only.—*Ibid.*
9. An objection to a bill to redeem by an assignee in bankruptcy, that it is not shown that the assignee obtained permission to bring the suit from the court of bankruptcy, if of any force in any event, will not be considered unless it is pleaded.—*Avery v. Ryerson*, 362.

10. An assignee in bankruptcy holding a subsequent mortgage, having filed a bill to redeem from a prior mortgage which had been foreclosed in chancery by proceedings to which he was not made a party, the fact that in the course of negotiations for an amicable redemption, before filing his bill, he had received from the mortgagor an order for the surplus moneys on the foreclosure sale, which had been paid into court, and had passed it to the solicitor of the purchaser at such sale, to enable him to get back the money, cannot be urged against him as evidence of his acquiescence in the sale as having cut off his subsequent mortgage; at least not where no such ground of defense is set up in the answer.—*Ibid.*
11. Whether where an assignee in bankruptcy has proceeded to decree in the federal court on a bill to foreclose a subsequent mortgage, it is competent, without permission of the bankruptcy court, to make him a defendant to a bill to foreclose a prior mortgage, so as thereby to affect his rights under the subsequent mortgage:—*Quære?*—*Ibid.*
12. Whether if it be competent under such circumstances thus without such permission to make the assignee in bankruptcy a party defendant and thereby conclude his rights under the subsequent mortgage, an averment simply that as assignee of A B (the subsequent mortgagee) he had or claimed to have rights and interests in the premises, or some part thereof, as subsequent incumbrancer or otherwise, is sufficient:—*Quære?*—*Ibid.*
13. Under a bill to quiet title, where complainant claims under a sheriff's deed, the objection for variance between the deed and the bill in description of premises, in that the deed, though properly otherwise specifying the lots and the name of the village and plat, omitted the county and state, is held to be without force where by their proceedings both parties have treated such deed as applying to the specific lots in question.—*Smith v. Brown*, 455.
14. A pleading filed as an information, though having many of the features of a bill, cannot be sustained as a bill when dismissed as an information; the attorney general, failing by his information to make out a case on behalf of the public, cannot bring the relator forward as orator at the hearing; and there can be no bill of complaint without a complainant.—*Attorney General v. Ewart Booming Co.*, 462.
15. On a bill to determine and protect the rights of complainant under one of two mortgages of even date, which is framed on the theory of priority, but which sets out the facts sufficiently, the court, having found the two mortgages to be in law simultaneous, under the general prayer granted a decree for a foreclosure and sale, and a ratable application of the

proceeds on the two mortgages, in case there should be insufficient to pay both.—*Van Aken v. Gleason*, 477.

See DIVORCE: ESTOPPEL, 7: FORECLOSURES, 3, 11-13.

ERASURE.

See PROMISSORY NOTES, 13.

ERROR.

See WRIT OF ERROR, 1, 2.

ERROR NOT CURED.

See EVIDENCE, 29.

ERRORS THAT DO NOT PREJUDICE.

See PRACTICE IN SUPREME COURT, 5, 16.

ESTATES OF DECEASED PERSONS.

1. The fact that an administrator on the hearing of a claim before the commissioners did not take the stand to contradict the testimony of the claimant, is not one from which inferences can safely be drawn against the estate.—*Anderson v. Russell*, 109.
2. On the hearing of a claim presented against an estate, where the question in dispute is whether the deceased had, just before his death, borrowed the amount of two notes produced, or whether, on the other hand, one of them represented a sum which was afterwards included in the other, much latitude of examination is allowable, within the discretion of the trial court, into circumstances that would tend to throw light upon the controversy, such as the amount of money the deceased received or had at about the time alleged.—*Ibid*.
3. The relative rights, duties and obligations of ordinary executors and of those who are residuary legatees and have filed a bond merely to pay the debts and legacies, are considered.—*Hatheway v. Weeks*, 237.
4. It is not admissible that one who has given the bond usually required of a residuary legatee (to pay the debts and legacies) and taken the estate and enjoyed it with all the rights of absolute owner, should be allowed, when called upon to pay the legacies, to refuse on the ground that the estate turned out not to be so valuable as he had supposed, and to be released from his bond on surrendering up the assets to be administered in the usual way.—*Ibid*.
5. And it is nothing to the point that the estate has thus far been honestly and economically administered, and that there-

fore the legatees have lost nothing; nor does it aid the matter as to those who stand out, that the majority of the legatees assent.—*Ibid.*

6. A residuary legatee's bond is holden for payment of the debts and legacies at all events, and the sufficiency of the assets is one of the risks the residuary legatee voluntarily assumes when he elects to give such bond instead of the ordinary executor's bond; and equity cannot relieve him from that risk. The giving of such bond conclusively admits assets.—*Ibid.*

ESTOPPEL.

1. Attending and bidding at an execution sale, as of the property of a third person, will estop such bidder from setting up title in himself to the property sold, as against a purchaser whom he by his acts has induced to believe that he made no claim of title.—*Wilber v. Goodrich*, 84.
2. The doctrine of estoppel *in pais* is not as broadly applicable to cases involving the legal title to real estate as to those where only personalty is in question, the proviso of the statute of frauds, that interests in lands shall not be created or transferred otherwise than by deed, operating as a limitation upon the doctrine.—*Hayes v. Livingston*, 384.
3. The remedy administered in equity, of compelling a release as for a fraud, is sustainable without the aid of the doctrine of estoppel, and these cases are therefore not in point upon the question under consideration.—*Ibid.*
4. The application of the doctrine of estoppel to voluntary adjustments of boundaries between contiguous estates, is not within the objection to its adoption in cases of transfers of title, since here the title is not supposed to be affected, but only the limit of the respective ownerships.—*Ibid.*
5. Cases of the dedication of lands to public uses are not precedents for the application of the doctrine of estoppel in violation of the aforesaid proviso of the statute of frauds, for dedications are not within that statute.—*Ibid.*
6. While it is a recognized ground of equitable relief to compel the owner of lands to surrender them up to one who by reliance upon such owner's fraudulent conduct has been misled into taking action which gives him a superior equity, yet at law the legal title must prevail, and under the statute of frauds it is not permissible that an estoppel resting in parol should work a transfer of the legal title to lands.—*Ibid.*
7. A defense based upon an estoppel *in pais* cannot be sustained unless it be pleaded; and an averment, in an answer to a bill to quiet title and to restrain an ejectment, that one alleged to be complainant's solicitor urged the bringing of

the ejectment, and represented that complainant was aware he had no title and was desirous of having an ejectment prosecuted to judgment to enable him to have recourse against his warrantor, but which is not pleaded as matter of estoppel, is insufficient, if established, to make out a valid defense of estoppel.—*Dale v. Turner*, 405.

See CONTRACTS, 4-7: EQUITY PLEADING AND PRACTICE, 10: FORECLOSURES, 8: MORTGAGES, 2: PROMISSORY NOTES, 14-16: RENTS, 5.

EVIDENCE.

1. A written contract between parties does not preclude the proving another distinct transaction entered into at the same time, which rested in parol, and which does not vary the written contract and is not inconsistent with it.—*Blackwood v. Brown*, 4.
2. While it might not be error to permit photographic copies of a will which is in controversy to be given to a jury, with such precautions as to secure their identity and correctness, yet their use can never be compulsory, and their rejection cannot be urged as error.—*Matter of Alfred Foster's Will*, 21.
3. The refusal to require the original will to be taken to the jury-room when the jury had not desired it, and against the objection of one of the parties, is held not contrary to law or good practice.—*Ibid.*
4. Where the genuineness of a document is in dispute, it would be hazardous to permit the jury to take the instrument to their jury-room, for the purpose of a comparison of the handwriting of the body of it with that of the signature, to aid them in determining whether it was a forgery.—*Ibid.*
5. Where the question is one to be determined mainly upon opinions belonging somewhat to the domain of expert evidence, like that of handwriting, it is not admissible to leave the matter to be settled by a jury-room inquest and inspection, in which the opinions of fellow jurymen, who may not be qualified to give an opinion at all, and whose qualifications are not investigated, may stand for more than the sworn testimony of the most careful and skillful expert.—*Ibid.*
6. The rule confining the use of papers for the purpose of comparison of handwriting, to such as belong in the cause, which was established for this state by *Vinton v. Peck*, 14 Mich., 287, is re-affirmed; the fact that an English statute since that decision allows the reception of such documents as are satisfactory to the court, does not destroy the force of the reason for the rule before prevailing.—*Ibid.*

7. An objection to the admission in evidence of the note sued upon, because it varied from the copy set out in the declaration, in that it contained the words "secured by mortgage," which did not appear in the copy, is held not well taken where it was accompanied by an admission of counsel that he was not misled by the omission.—*Howry v. Eppinger*, 29.
8. An objection to the introduction in evidence of the note in suit, because the endorsements were not proven, will not prevail where the payees have endorsed in blank, and are made defendants and fail to deny the execution; notes after such endorsement would pass by delivery, and it would not be necessary to prove subsequent endorsements.—*Ibid.*
9. A party can never be compelled against his will to accept his adversary's admission in lieu of record evidence.—*John Hancock Mut. Life Ins. Co. v. Moore*, 41.
10. A paper which is admissible in evidence for one purpose does not become inadmissible because it cannot be used for another.—*Ibid.*
11. Where a question in issue depends upon written correspondence put in evidence, the authenticity and bearing of which is undisputed, it is for the court to expound it and to instruct the jury directly and distinctly as to its legal effect upon the issue, and not to leave it to the jury to interpret and construe it.—*Battershall v. Stephens*, 68.
12. The documentary evidence in this case showing distinctly that the plaintiff was not a purchaser in good faith and for a valuable consideration within the intent and meaning of the registry law, it was error for the court to lead the jury to suppose it was competent for them to find otherwise, instead of declaring to them the necessary legal effect of the unquestioned facts.—*Ibid.*
13. Whether one claiming protection under the registry law against a prior unrecorded deed is or is not a purchaser in good faith and for a valuable consideration, does not necessarily involve any question as to his integrity or the merely moral quality of his acts and conduct in obtaining the conveyance.—*Ibid.*
14. A purchase of one not claiming to be present owner and of what is understood not to be an assured title, but merely something that will aid in getting rid of or overcoming any rights others might hold or assert, and which is made without any idea of dealing on the footing of an actual buying or selling of the land, is not such a purchase in good faith as will prevail over a prior unrecorded deed.—*Ibid.*
15. A transfer of lands worth a thousand dollars for a present payment of twenty-five dollars, which was not designed as a sale of the lands, but as a trade for an indefinite amount to

- be ascertained afterwards and to depend upon the success of the adventure, is not such a dealing as will invest the grantee with a right which by force of the registry law is sufficient to overcome a prior unrecorded deed.—*Ibid.*
16. It is for the court, and not the jury, to construe and determine the legal effect of written instruments introduced in evidence.—*Stadden v. Hazzard*, 76.
 17. A transcript from a justice's docket which is not certified as a transcript may be proved by the oath of the justice; but where neither certified nor otherwise proved it is not admissible in evidence to prove the judgment.—*Wüher v. Goodrich*, 84.
 18. A party cannot support his positive testimony of facts stated upon his own knowledge by testifying himself to other consistent or corroborative facts that are immaterial in themselves, and which, like the facts sought to be corroborated, must rest entirely upon his own oath.—*Anderson v. Russell*, 109.
 19. Where the defense of fraud is set up, a wide latitude should be allowed upon the cross-examination of a witness who was a participant in the transaction, and much must be left to the discretion of the trial court.—*Anderson v. Walter*, 113.
 20. In an action for services in purchasing and shipping sheep for defendants, it is error on cross-examination of a witness who has given evidence tending to show the purchase from witness by plaintiff of certain specified sheep for defendants, to exclude the inquiry as to who paid him for such sheep; the payment in completion of the bargain might direct the jury to the principal for whom the purchase was made with quite as much certainty as any testimony of witnesses as to their mere understanding; the inquiry is relevant and important.—*Parker v. Grinnell*, 199.
 21. Where it is claimed money has been paid out on written orders, the orders themselves are the best evidence, and if accessible, the first medium of proof; and the exclusion of parol evidence of such payment, in the absence of any showing that the orders were not producible, is not error.—*Mason v. Fractional School District, etc.*, 228.
 22. Where a letter has been received in evidence against objection for want of authority in the writer to act for the party, at a time when there was some showing of his agency, this ruling cannot be complained of on review, though the subsequent cross-examination disclosed that the writer had no such authority, no motion having been made after such cross-examination to strike out the letter as evidence.—*Metropolitan Life Ins. Co. v. Ethier*, 277.
 23. It is competent for a person to testify as a witness to his own age.—*Cheever v. Congdon*, 296.

24. In an action upon a contract promising to pay a specified amount upon the completion of a certain railroad, where the declaration avers the contract to have been made for a valuable consideration, and the antecedent negotiations out of which the contract grew are relied upon as constituting such consideration, it is not error to allow such preliminary negotiations to be very fully disclosed, and a wide discretion in that regard must be left with the trial judge.—*Tower v. Detroit, L. & L. M. R. R. Co.*, 328.
25. An inquiry put to a laborer on the railroad, as to the number of persons ordinarily required on a completed road to keep in repair a specified distance of the line, is held to have been properly overruled; the witness was not shown to be competent to express an opinion on the subject, and moreover the inquiry is not susceptible of a direct answer, as there is and can be no general rule on the subject.—*Ibid.*
26. A transcript of the record of a United States patent of lands, certified by the commissioner of the general land office to be "a true and literal exemplification from the record in this office," is held to be sufficiently certified under the United States statutes (*Rev. Stat.*, p. 168, § 891, p. 454, §§ 2469-70), to be admitted in evidence.—*Boyce v. Stambaugh*, 348.
27. In an action to recover for goods furnished by plaintiff to defendant's father and mother at his request, the plaintiff's statement as a witness, that a part of the goods furnished were intoxicating liquors, and he "couldn't tell the amount," is construed, in connection with his other testimony, as to the bill of particulars of his demand, i. e., that it was a copy of his books, not to mean that the items for liquors were incapable of being separated and distinguished from the others, so as thereby to render his whole claim void.—*Curley v. Wyman*, 353.
28. Plaintiff, while on the stand as a witness, was questioned as to a date, and replied he could not state it positively without refreshing his memory by a memorandum he had; after professing to look, he stated that what he looked at did refresh his memory; being called upon by defendant's counsel to produce the memorandum, plaintiff's counsel objected and the objection was sustained:—
Held, That this was error; that the witness was in effect testifying not from recollection, but from something he professed to have in writing; and that defendant had a right to know what the memorandum was on which witness relied, and whether it had any legitimate tendency to bring to mind the fact in controversy.—*Duncan v. Seeley*, 369.
29. The error committed in declining to require the production of the memorandum thus referred to is held not to have

- been cured by an offer the next day to produce the memorandum; the party was entitled to see it at the time, in order to test the candor and integrity of the witness.—*Ibid.*
30. In an action to recover the price of barley claimed to have been sold and delivered by plaintiff to defendant, the question put to plaintiff on cross-examination, as to how long he had speculated in barley, is held to have been improperly overruled, there being nothing to indicate that it was put in an offensive sense, and it being a proper question to test his skill in judging of qualities.—*Ibid.*
 31. Where business is conducted entirely by the husband, but in the name of the wife, the latter will be bound by the statements and conduct of the husband in the course of the business, and notice to the husband is notice to the wife.—*Leland v. Collier*, 418.
 32. Where an assignment to an employé, claimed to have been given in consideration of an indebtedness from the employer, partly for money loaned and partly for wages earned, is attacked as being fraudulent against creditors, evidence is admissible, as bearing upon the fairness of the transaction, to show that the money loaned was money belonging to the employé before entering into the service of the employer.—*Winfield v. Adams*, 437.
 33. The statements of a steamboat clerk, not shown to occupy any position of general agency, are not admissible in evidence to bind the corporation employing him, as to matters not within the scope of his employment.—*Ward's Central & Pacific Lake Co. v. Elkins*, 439.
 34. Questions put to prove a contract, which call for the inferences of the witness rather than the actual terms of the contract, are improper.—*Ibid.*
 35. Fraud being charged, self-contradictions, vague and partial explanations from witnesses not likely to be well informed, failure to call others presumably acquainted with controlling circumstances, destruction of letters connected with the controversy, and inability, real or feigned, to reveal their contents, are incidents inconsistent with a claim of good faith.—*Smith v. Brown*, 455.
 36. It is not admissible, under a charge in a bill of particulars for money loaned to the defendant, to give in evidence the loan of a United States bond; such a charge can be supported only by proof of the loan of coin, bank bills, or some well known circulating medium, popularly known and designated as money.—*Waterman v. Waterman*, 490.
 37. Where in defense to an action for money loaned an attempt is made to show that plaintiff could not have made the loans claimed because not of sufficient pecuniary ability, it

- is competent for the plaintiff in reply to show what means he had from which the loans could have been made.—*Ibid.*
38. The plaintiff claiming, and defendant denying, that plaintiff had loaned defendant moneys with which to pay off a mortgage on his farm, evidence was held admissible to prove declarations and admissions by defendant that plaintiff had an interest in the farm.—*Ibid.*
39. In an action to recover for moneys claimed to have been loaned by the plaintiff to defendant with which the latter paid off certain incumbrances, the payment of which was conceded, the dispute being only as to who furnished the means, the refusal to receive in evidence the securities themselves, in connection with the testimony as to their payment, is held not error.—*Ibid.*
40. In a controversy between an administrator and the son of the deceased as to the title to certain personal property formerly owned by decedent and now claimed by the son, much liberality should be indulged in receiving evidence having any legitimate tendency to show what the understanding was between the father in his lifetime and the son regarding the ownership of the property in controversy.—*Chambers v. Hill*, 523.
41. While a witness testifying to declarations of a party, or conversations, should give the words used if able so to do, yet a general answer, embodying the substance or purport, is not objectionable where that is all the witness can recollect.—*Ibid.*
42. The striking out of an answer to a specific question, though improper, is held not to be error where the ground of the evidence stricken out is substantially covered by other testimony in the case, and it does not appear that the party complaining of it was injured by the ruling.—*Ibid.*
43. In a suit between an administrator and a son of the deceased, involving the title to personal property claimed by the administrator to belong to the estate, the son is precluded by the statute (*Comp. L. 1871, § 5968*) from testifying as a witness to conversations between himself and his father in the lifetime of the latter, as being matter equally within the knowledge of the deceased.—*Ibid.*
44. A witness having testified to a material conversation in the family of the deceased, it is not competent in rebuttal thereof to call a neighbor to testify merely to having never heard such a conversation in the family; such negative testimony has no positive legal value.—*Ibid.*
- See AGENCY, 4: ATTACHMENT, 3: BAIL BONDS, 6: BANKS, 2-5:
BILL OF EXCEPTIONS: BILL OF PARTICULARS: BURDEN OF
PROOF, 1, 2: CHARGE TO THE JURY, 1: CONTRACTS, 6, 10-13:

COUNTY TREASURERS, 2, 3: DAMAGES, 1, 5: DECLARATION, 4: DEEDS, 3: ESTATES OF DECEASED PERSONS, 1, 2: EXECUTION SALES, 3: FINDING OF FACTS, 2: FORECLOSURES, 9, 10: GOODS SOLD AND DELIVERED, 1, 2: INSURANCE, 2-6, 13: LETTERS OF GUARDIANSHIP, 1, 2: NEGLIGENCE, 1, 2: PRACTICE IN CIRCUIT COURTS, 4: PRACTICE IN SUPREME COURT, 1, 2, 5: PROMISSORY NOTES, 9-11, 13, 17, 18: RAILROADS, 5: RAPE: REPLEVIN, 1, 4, 6: STIPULATIONS: TRESPASS, 3: WILLS, 2, 3.

EXACT WORDS USED.

See EVIDENCE, 41.

EXAMINATION OF WITNESSES.

See PRACTICE IN CIRCUIT COURTS, 4.

EXAMINATIONS.

See CRIMINAL EXAMINATIONS, 1-6.

EXAMINING MAGISTRATE.

See CRIMINAL EXAMINATIONS, 1-6.

EXCEPTIONS.

See PRACTICE IN SUPREME COURT, 10, 11: REFEREES, 1, 2.

EXCESSIVE ASSESSMENT.

See TAX TITLES.

EXECUTION.

In blank: See DEEDS, 5.

Of deeds: See DEEDS, 1, 5.

Of promissory notes: See PRACTICE IN CIRCUIT COURTS, 2: PROMISSORY NOTES, 14-16.

EXECUTION SALES.

1. Under the statute (*Comp. L. 1871, § 6106*) forbidding the sale of personalty on execution unless the same be present and within the view of those attending such sale, a sale of an interest in a growing crop of corn, made at a place distant from the field half or three-quarters of a mile, and from which the property sold could not have been seen, cannot be supported.—*Winfield v. Adams*, 437.
2. The query is suggested, whether a sale on execution of a growing crop of corn in separate fields on different sections.

made at a place distant thirty or forty rods from one of the fields and eighty or a hundred from the other and in view of both, can be supported under the principle of *Perkins v. Spaulding*, 2 Mich., 157.—*Ibid*.

3. One claiming rights in property that has been sold on execution, by a title originating prior to the levy, is not precluded by the return of the officer from showing the real facts as to the validity of the levy and sale.—*Ibid*.
See EQUITY JURISPRUDENCE, 12: ESTOPPEL, 1.

EXECUTORS.

See ESTATES OF DECEASED PERSONS, 3.

EXPENDITURES.

See HIGHWAYS, 4

EXPERTS.

See EVIDENCE, 5.

EXPRESS CONTRACT.

See CONTRACTS, 2.

EXTENSIONS.

See CONTRACTS, 1: COUNTY TREASURERS, 1: MORTGAGES, 3:
PRINCIPAL AND SURETY.

EXTREME CRUELTY.

See DIVORCE.

FAILURE OF PERFORMANCE.

See COUNTY TREASURERS, 3: QUANTUM VALEBAT, 1, 2.

FAILURE TO PROTEST.

See PROMISSORY NOTES, 7-12.

FALSE IMPRISONMENT.

1. One who in making a criminal complaint merely states the facts and circumstances to the prosecuting attorney and swears to the complaint drawn by the latter embodying such facts, is not liable in an action for false imprisonment, though the facts sworn to fail to make out a criminal offense.—*Murphy v. Walkers*, 180.

2. All criminal proceedings being on behalf of the people, there is no legal presumption of any personal interference by private persons beyond what is made to appear.—*Ibid.*
3. In criminal proceedings one who simply lays facts before a magistrate and leaves all determination to the unbiased and unsolicited conduct of that officer, is not liable in trespass for false imprisonment unless he takes some part in furthering the arrest or urging the detention of the accused.—*Ibid.*

FALSE REPRESENTATIONS.

See DECLARATION, 3, 4: INSURANCE, 13.

FATHER AND SON.

See CONTRACTS, 21.

FENCES.

See RAILROADS, 4, 5.

FINAL ACTION.

See REMOVAL OF COUNTY SEAT.

FINAL ORDER.

See EMINENT DOMAIN, 1.

FINDING OF FACTS.

1. The finding of the circuit judge, upon a trial by the court without a jury, is conclusive upon every question of fact specifically passed upon.—*Tower v. Detroit, L. & L. M. R. R. Co.*, 328.
2. It is not error (though not a commendable practice) for the judge's finding to embrace some of the evidence and to state the reasons which brought him to his conclusions; but this will not enable the court of review to weigh the evidence or to pass upon the soundness of the reasoning given.—*Ibid.*
3. A finding that the condition of the contract in suit was performed "as the parties should be understood to have intended," and that the condition "ought to be held performed," is equivalent to a finding that it was performed according to the intent of the parties, or according to its legal effect.—*Ibid.*

See REFEREES, 1, 2: SPECIAL QUESTIONS TO JURY, 1-4.

FLOATAGE.

See NUISANCES, 2-5: RIPARIAN OWNERS.

34 MICH.—74

FLOWAGE.

See MILLDAMS, 1-3.

FORECLOSURES.

1. One who in the purchase of land has had deducted from the purchase price the amount of certain mortgages, and has taken a deed providing that he shall assume and pay such mortgages, is personally liable to the mortgagee to pay the same; and such personal liability may properly be enforced in a suit to foreclose the mortgage.—*Miller v. Thompson*, 10.
2. A grantee who has accepted such a deed cannot dispute either the legal execution of the mortgages or the amount thereof as specified in the proviso of the deed; such an arrangement is equivalent to a direction from the grantor to the grantee to pay so much of the purchase price to the mortgagee, and the grantee is liable to pay the amount he undertakes to, and no more and no less.—*Ibid.*
3. The mortgagor in such a case is not a necessary party to the foreclosure suit, where no relief is sought against him personally.—*Ibid.*
4. No novation is required, in case of such a deed, to substitute the grantee as the debtor, at the election of the mortgagee, in the place of the mortgagor.—*Ibid.*
5. A foreclosure bill which makes certain parties defendants as subsequent purchasers or incumbrancers is not multifarious because it alleges that such defendants claim some adverse interest.—*Wilkinson v. Green*, 221.
6. A title which is adverse and paramount to that of both mortgagor and mortgagee cannot be litigated in a foreclosure suit; but the question whether an asserted claim is such an adverse one as to come within this rule, depends not upon what is set up in the answer in regard to it, but rather upon what the bill charges and the proofs show to be its real character.—*Ibid.*
7. Where a subsequent purchaser of the mortgaged premises from the mortgagor has, in order merely to perfect his title of record, procured quit-claim deeds from the mortgagor's grantors under such circumstances as would render it fraudulent for him to set up such conveyances as a title adverse and paramount to that of the mortgagor, the mortgagee, under proper allegations in his foreclosure bill, may have such alleged adverse title declared null and void.—*Ibid.*
8. Parties who have obtained possession of lands from their grantor cannot afterwards repudiate his title, and all releases thereafter procured by them to cure defects in the title of such grantor must be held to have been obtained in support of, and not for the destruction of such title.—*Ibid.*

9. In a foreclosure suit the production of the securities is necessary to enable the complainant to recover, unless their loss is sufficiently accounted for and clear proof given of their continued efficacy.—*Hungerford v. Smith*, 300.
10. Where a foreclosure bill is brought against an alleged subsequent purchaser after the death of the mortgagor and nearly twenty years after the maturity of the mortgage, a very satisfactory showing of a continuing obligation is required, in the absence of the securities themselves.—*Ibid*.
11. The right of the holder of a subsequent mortgage to redeem from a prior mortgage is not cut off or affected by a foreclosure decree and sale under the prior mortgage, where at the time of such decree and sale no party to the foreclosure suit in any way represented, or had any right or interest in such subsequent mortgage.—*Avery v. Ryerson*, 362.
12. Where an assignee in bankruptcy of a subsequent mortgagee, who has been made a party defendant to a foreclosure bill, dies before decree, the right to bind such subsequent mortgage by the decree and sale, thereby terminates as completely as if a sole administrator of the subsequent mortgagee had in like manner been made such party and afterwards died.—*Ibid*.
13. Where a chancery foreclosure to which an assignee in bankruptcy of a subsequent mortgagee has been made a party, had proceeded to decree and sale after the death of such assignee, without bringing in his successor, or any one else who represented such subsequent mortgage, it was held, in a suit brought by the successor of such assignee to redeem, that his equities were superior to those of the purchaser at the foreclosure sale, and a decree for redemption was granted.—*Ibid*.

See CHATTEL MORTGAGES, 8: EQUITY JURISPRUDENCE, 6, 7:
EQUITY PLEADING AND PRACTICE, 10-12, 15.

FOREIGN PROBATE.

See PROBATE COURTS.

FORFEITED CONTRACTS.

See DAMAGES, 1: MANDAMUS, 2.

FORFEITURES.

See CHATTEL MORTGAGES, 9: EQUITY JURISPRUDENCE, 5-7:
INSURANCE, 7, 9, 10.

FORGERY.

See EVIDENCE, 4-6: FRAUDULENT PROCUREMENT OF SIGNATURE, 2.

FORMAL DEFECTS.

See ATTACHMENT, 5.

FORWARDING DELINQUENT TAX LISTS.

See COUNTY TREASURERS, 1-3.

FRAUD.

Where one has made payments of interest upon a mortgage which by deed to him he has assumed to pay, and has made no complaint for a year and a half, he will not be heard to urge in defense to the clause in the deed whereby he assumed such mortgage, that it was fraudulently inserted in the deed.—*Miller v. Thompson*, 10.

See EQUITY JURISPRUDENCE, 2: ESTOPPEL, 3: EVIDENCE, 19, 32, 35: INDIAN TREATY, 3: PARTNERSHIP, 1.

FRAUDULENT MISREPRESENTATIONS.

See PROMISSORY NOTES, 11.

FRAUDULENT PROCUREMENT OF SIGNATURE.

1. The clause of the statute (*Comp. L. 1871, § 7590*) relating to the deceptive obtainment of one's signature to a written instrument, is not subject to the objection that it is of no legal force or efficacy because it does not contain the word "false," nor any other term or expression of equivalent import, in the description of the facts to constitute the offense; the first branch of the section which specifies the intent and falsity of the fraud applies to and characterizes the second branch thereof.—*People v. Mott*, 80.
2. It is not essential to the statutory offense of fraudulently obtaining one's signature to a written instrument that the facts should be sufficient to make out a forgery; the statute refers to forgery only to distinguish the kind of instruments which are the subjects of the offense, *i. e.*, such as if forged would support a charge of forgery.—*Ibid.*

FRAUDULENT PURCHASE.

See GOODS SOLD AND DELIVERED, 3.

FRAUDULENT TRANSFERS.

See EQUITY JURISPRUDENCE, 12: EVIDENCE, 32.

FRIGHTENING HORSES.

See HIGHWAYS, 11.

FRONTAGE.

See TAXATION, 7.

GARNISHMENT.

A register in chancery with whom in his official character money has been deposited under an order of the court by a receiver, cannot be made liable on account thereof as garnishee of the parties to whom the money so deposited lawfully belongs, though the proceedings under which the money was paid in have long since been dismissed and determined; the money would still remain in the custody and subject to the control of the court, and its possession by the register would still be in his official capacity.—*Voorhees v. Sessions*, 99.

GENERAL DEMURRER.

See EQUITY PLEADING AND PRACTICE, 6, 7.

GENERAL EXCEPTION.

See PRACTICE IN SUPREME COURT, 11.

GENERAL ISSUE.

See PLEA, 2, 3.

GENERAL RIGHT.

See EQUITY JURISPRUDENCE, 14, 15.

GENERAL TAX.

See TAXATION, 5-7.

GENERAL VERDICT.

See INSURANCE, 12 SPECIAL QUESTIONS TO JURY, 1-4.

GIST OF THE OFFENSE.

See BIGAMY, 2.

GOOD FAITH.

See BANKS, 1-5: CHATTEL MORTGAGES, 2, 3: EVIDENCE, 32, 85: MORTGAGES, 4: PROMISSORY NOTES, 14-16.

GOOD REPUTATION.

See PRACTICE IN SUPREME COURT, 13.

GOODS SOLD AND DELIVERED.

1. In an action upon the common count for goods sold and delivered, evidence that defendant and three others executed a written proposal to buy of plaintiffs a printing press and material to a specified amount, to be selected by a third person; each to pay one-fourth, with the understanding that such third person should take the offer to plaintiffs, who were to execute it in duplicate and return one copy, and that the goods were to be shipped to the purchasers, who were to pass them over to such third party on his giving them a mortgage on these goods and other property to secure the purchase price, but that plaintiffs on receiving such instrument, without executing any duplicate and without notice to defendant or his associates, shipped to said third party direct such goods as he selected and exceeding in amount the limit specified, and that the latter never executed the mortgage agreed upon,—will not warrant a recovery.—*Carpenter v. Butterfield*, 97.
2. Subsequent negotiations between the parties for a compromise or an adjustment are held not to have given rise to any liability on the part of the defendant capable of enforcement under the count for goods sold and delivered, if at all.—*Ibid.*
3. In an action to charge defendants for the price of goods delivered to and disposed of by them, upon the ground that it was fraudulently contrived that the third person through whom the goods were obtained of plaintiffs should purchase them ostensibly for another firm, but secretly and really for the defendants, and that the purchase was so made, the right of recovery cannot properly be made to turn upon directions given by defendants to such third person to abstain from making a purchase in their name on credit.—*Linn v. Howell*, 102.

GOODS SUBSEQUENTLY ACQUIRED.

See CHATTEL MORTGAGES, 5-7.

GRANTEE.

See DEEDS, 5.

GRANTOR'S INTEREST.

See RENTS, 2-4.

GRANTS.

See MILL-DAMS, 1-3.

GROUND **S OF OBJECTION.**

See PRACTICE IN SUPREME COURT, 4.

GROWING CROPS.

See ATTACHMENT, 9: DAMAGES, 5: EXECUTION SALES, 1, 2.

GUARDIAN AND WARD.

It is a complete defense to an action brought at the instance of the guardian of a minor, upon the bond of an executor, to recover an amount the minor was entitled to from the testator's estate, that the minor after attaining his majority settled the whole claim with the executor, receiving payment partly in cash and partly by note; and the fact that the guardian at the time of such settlement had not settled his trust account, is nothing to the point.—*Cheever v. Congdon*, 296.

See EJECTMENT, 4: LETTERS OF GUARDIANSHIP, 1, 2: MORTGAGES, 1.

GUARDIAN'S SALE.

See EJECTMENT, 4.

HANDWRITING.

See EVIDENCE, 4-6.

HIGHWAY COMMISSIONERS.

See HIGHWAYS, 5-8: MANDAMUS, 1.

HIGHWAYS.

1. The law requiring highway commissioners, in proceedings to lay out a highway, to issue their notice for convening the board within five days after the receipt of the application of the freeholders, a delay of more than a month in taking this step is fatal to their power to proceed on the basis of such application.—*Detroit Sharpshooters' Association v. Highway Commissioners of Hamtramck*, 36.
2. A written statement by one of the commissioners without date, of the service of notice on owners and occupants, which contains no description of the notice or any date in regard to the time of service, is not sufficient proof of service of the statutory notice required in such proceedings. Regularly there should be sworn evidence in writing of the service, made and filed with the board.—*Ibid.*
3. In all cases where the property of individuals is sought to be condemned for the public use by adverse proceedings, the

- statute must be strictly followed, and especially must every jurisdictional step, and every requirement shaped to guard the rights and interests of parties whose property is meant to be taken, be precisely observed.—*Ibid.*
4. Highways and roads are by the constitution put under the control of the boards of supervisors, not absolutely, but under legal restrictions, and those restrictions have confined them to state and territorial roads; and they can have no occasion to raise money for other roads, and they must exercise their own judgment in expending such moneys as they may lawfully raise.—*Attorney General v. Supervisors of Bay County*, 46.
 5. A highway commissioner who has wantonly sold trees in a highway cannot justify his action, when sued in trespass by the owner, by the statute (*Comp. L. 1871, § 1317*) authorizing him under certain circumstances to order the removal of trees from the highway.—*Clark v. Dasso*, 86.
 6. The policy of our laws favors the planting and preservation of shade trees in the public streets where they do not constitute actual obstructions.—*Ibid.*
 7. Trees in the highway are the property of the adjacent owner; and if they encroach upon the highway and must be removed, he has a right, and must be afforded reasonable opportunity, to take them as living trees and transplant them elsewhere.—*Ibid.*
 8. A highway commissioner who acts upon his own judgment in removing trees, instead of instituting a prosecution, must take such risk as there may be of a jury differing with him in opinion in case he is prosecuted; and he should be prepared to justify his action, not upon his belief merely, but upon the actual fact.—*Ibid.*
 9. A highway is a public way for the use of the public in general, for passage and traffic, without distinction; and the restrictions upon its use are only such as are calculated to secure to the general public the largest practicable benefit from the enjoyment of the easement, and inconveniences such as are only incident to a reasonable use under impartial regulations are not actionable.—*Macomber v. Nichols*, 212.
 10. Persons making use of horses as the means of travel or traffic by the highways have no rights therein superior to those who make use of the ways in other permissible modes; improved methods of locomotion are admissible, and cannot be excluded from existing public roads if not inconsistent with the present methods.—*Ibid.*
 11. In an action for injuries caused by a horse taking fright on the highway at an engine being propelled by steam, it is error to permit the right of recovery to turn upon whether the engine was calculated to frighten horses of ordinary gentleness; the bringing of an unsightly object into the com-

- mon highway is not necessarily a wrong because of its tendency to frighten horses, any more than the construction of a bridge over a river is a wrong because of its tendency to delay vessels.—*Ibid.*
12. If one in making use of horses as a means of locomotion on the highway is injured by the act or omission of another using a steam locomotive, the question is not one of superior privilege, but whether under all the circumstances there is negligence imputable to some one, and if so, who should be accountable for it.—*Ibid.*
 13. The engine as a means of locomotion in the highway is not necessarily a nuisance, and the question whether its use as such has in a particular instance been so negligently managed to the injury of others as to give rise to a right of action, is one of fact for the jury as a question of reasonable conduct and management on the part of both parties.—*Ibid.*
 14. Proceedings to establish a public highway through private lands cannot be sustained where the record fails to show service of the statutory notice of the meeting: and a showing of notice of a meeting to be held April 25th, will not uphold a meeting held May 11th, in the absence of any showing of notice of such latter meeting, or that it was held as an adjourned meeting.—*Pegler v. Highway Commissioners of Grand Rapids*, 359.
 15. The statute (*Comp. L. 1871, § 1268*) designed to cure defects in the laying out and recording of highways, has no application to mere private ways, but is confined to public highways; and in an action to recover damages for injuries caused by obstructions placed in a roadway, where it is disputed whether the road was a public or a private way, a charge to the jury that if the way in controversy was, on March 15, 1861, a road not recorded, but had been used as such for ten years or more, then the same by force of said statute became and was a public highway, is held to be error.—*Green v. Beltz*, 512.
See LEGISLATIVE ACTION, 3: NUISANCES, 2: TAXATION, 1, 2.

HOMESTEAD.

See CONTRACTS, 15, 16.

HORSES.

See HIGHWAYS, 10-13.

HUSBAND AND WIFE.

See CONTRACTS, 15, 16: EQUITY JURISPRUDENCE, 12: EVIDENCE, 31: PARTNERSHIP, 1-4.

IDENTIFICATION.

See DESCRIPTION OF PROPERTY, 1, 2.

ILLEGALITY.

See CONSIDERATION: PRACTICE IN SUPREME COURT, 6.

IMMATERIAL MATTERS.

See CHARGE TO THE JURY, 1: CONTRACTS, 6: EVIDENCE, 39:
GOODS SOLD AND DELIVERED, 3.

IMMATERIAL REMARKS.

See CHARGE TO THE JURY, 4.

IMMEDIATE ACTION.

See DAMAGES, 4.

IMPLIED AUTHORITY.

See CORPORATIONS, 1: DIRECTORS OF THE POOR.

IMPLIED OBLIGATION.

See BANKS, 1,

IMPLIED PROMISE.

Where one has employed another to manufacture articles at an agreed price out of materials to be furnished by the former, the fact that he himself, without request, assists in the manufacture, will not raise an implied promise on the part of the other party to pay for such services.—*Lange v. Kaiser*, 317.

IMPRISONMENT.

See PRISONS.

IMPROVED METHODS OF LOCOMOTION.

See HIGHWAYS, 10, 12.

IMPROVEMENT OF NAVIGABLE STREAMS.

See EMINENT DOMAIN, 1-4: LEGISLATION, 1, 2.

INCIDENTAL INCONVENIENCE.

See EQUITY JURISPRUDENCE, 14, 15.

INCONSISTENCY.

See SPECIAL QUESTIONS TO JURY, 1-4.

INCONVENIENCE.

See HIGHWAYS, 9: NUISANCES, 1.

INCREASED RATE OF INTEREST.

See MORTGAGES, 3.

INCREASE OF STOCK.

See CORPORATIONS, 1-4.

INDIAN AGENTS.

See INDIAN TREATY, 3.

INDIAN TREATY.

1. Under the practical interpretation put on the Indian treaty of October 18, 1864, by the government, the selection of lands and the competency of the grantees both became operative together when fixed by the proper official authority, and both were before that ambulatory.—*Raymond v. Shawboose*, 142.
2. No disposition by an Indian of lands he expected to receive under this treaty, which antedates the determination of his competency to take under the terms of the treaty, can be held valid.—*Ibid*.
3. The executive department is not so bound by the conduct of Indian agents that it cannot repudiate their frauds and decline to follow their false decisions.—*Ibid*.

INDEMNITY.

See DECLARATION, 1, 2: MORTGAGES, 9.

INDIVIDUAL ACTION.

See CORPORATIONS, 3.

INFANCY.

See BURDEN OF PROOF, 2.

INFANTS.

See BURDEN OF PROOF, 2: DESCENT OF PROPERTY, 1, 4:
EJECTMENT, 4: GUARDIAN AND WARD, 1.

INFERENCES.

See EVIDENCE, 34.

INFORMATIONS.

Where it is claimed on the introduction of the note in evidence, the signature to which is alleged to have been fraudulently obtained, that there is a variance between the note and the description of it in the information, in that the words "North Branch" appended to the date were omitted in the pleading, it is competent to allow an amendment to meet the objection.—*People v. Mott*, 80.

See ASSAULT WITH INTENT TO RAVISH: CRIMINAL EXAMINATIONS, 6: EQUITY JURISPRUDENCE, 13, 15: EQUITY PLEADING AND PRACTICE, 14.

INHERITED ESTATE OF MINORS.

See DESCENT OF PROPERTY, 1-4.

INJUNCTION.

See EQUITY JURISPRUDENCE, 1, 4: EQUITY PLEADING AND PRACTICE, 4.

INJUNCTION BILL.

See EQUITY PLEADING AND PRACTICE, 5.

INJURY.

See ACTION ON THE CASE: CONTRACTS, 4: LEGISLATIVE ACTION, 2: PROMISSORY NOTES, 9.

INQUEST.

See PRACTICE IN CIRCUIT COURTS, 1.

INQUIRY.

See PROMISSORY NOTES, 1-6.

INSANITY.

See INSURANCE, 5, 7, 10-12.

INSOLVENCY OF MAKER.

See PROMISSORY NOTES, 9-11.

INSTRUCTIONS.

To agent: See PROMISSORY NOTES, 3, 5, 6. See CHARGE TO THE JURY.

INSURANCE.

1. A surrender of an insurance policy, such as to discharge the insured from liability on a premium note, under an arrangement that upon surrendering the policy the note should be delivered up, must be accomplished by a dealing immediately and directly with the company or its agents; and a delivery to a stranger, with notice to the company, is not enough.—*American Ins. Co. v. Woodruff*, 6.
2. In an action by an administrator upon a life insurance policy, the letters of administration are admissible in evidence to show the plaintiff's capacity, and they cannot be excluded on the objection that they are no evidence of death.—*John Hancock Mut. Life Ins. Co. v. Moore*, 41.
3. An admission that proofs of death had been furnished to the company, will not preclude the introduction of the documentary evidence.—*Ibid*.
4. In civil cases death, like any other fact, may be proved by circumstantial evidence, and it is not necessary to produce an eye witness to the fact.—*Ibid*.
5. Evidence tending to show that one who had disappeared had been for a considerable time laboring under a severe and dangerous disease of the brain and spine, which in the opinion of his physician must have proved fatal in a short time and must probably have rendered him insane, with evidence of its effect on his feelings and conduct, indicating that his mind was affected by the disease, is sufficient to warrant the submission of the question of his sanity, in a case where it was material, to the jury as one of fact.—*Ibid*.
6. A sudden disappearance and the failure after search to discover any traces of a man who if living could not easily have gone unnoticed, and who was in such a physical and mental condition as to excite the anxiety of his friends, cannot be said to afford no evidence tending to prove his death, or to authorize an instruction to the jury to that effect.—*Ibid*.
7. In an action upon a life policy, a condition in the policy making it void in case the person whose life is insured die by his own hand, is to be construed as in the nature of a penalty or forfeiture, and the burden is on the insurers to show it, and not on the insured to negative it.—*Ibid*.
8. The term "suicide" means self-killing, just as homicide means killing another; and it cannot be restricted in meaning to apply only to a wrongful act of self-murder.—*Ibid*.

9. The act of self-killing as a cause of forfeiture being classed in the policy among others involving such wrongful conduct as death by duelling, by the hands of justice, or in the violation of the laws, or impairing health by vice or intemperance, it is to be inferred that it is regarded as *ejusdem generis* and depending on the same reasons.—*Ibid.*
10. Such a condition cannot be construed to cause a forfeiture for acts involving no evil will, such as self-slaughter by an insane person.—*Ibid.*
11. The very object of life insurance is to provide for death by disease or in the ordinary course of nature; and death by his own hands, in the case of one *non compos*, is as much the result of disease as death by fever or consumption.—*Ibid.*
12. In an action upon a life policy containing such a condition, a special finding of suicide, without a further finding that it was voluntary, would not conflict with a general verdict against the insurers; and the failure of the jury to answer the special question, whether the person whose life was insured committed suicide, will not vitiate or overturn the verdict.—*Ibid.*
13. Notice of special defense to a life policy on the ground of fraudulent misrepresentations, though it fail to assert in express terms that the alleged false representations were contained in the application, is held sufficient, where it refers to the application, and where plaintiff could not have been misled, to permit the introduction of the application in evidence as containing the fraudulent representations specified in the notice.—*Metropolitan Life Ins. Co. v. Elhier*, 277.
See CHATTEL MORTGAGES, 10: PRACTICE IN SUPREME COURT, 1, 2.

INTENDMENTS.

See AWARDS, 3: EMINENT DOMAIN, 2.

INTENT.

See WILLS, 3.

INTEREST.

1. An allowance of interest according to the terms of the contract is not erroneous, though there was no showing of notice to defendant that the condition of the contract had been performed.—*Tower v. Detroit, L. & L. M. R. R. Co.*, 328.
2. Under an arrangement whereby parties who had contracted to saw certain logs were to sell the lumber and receive the proceeds thereof, they having no right to use the proceeds beyond paying themselves their saw-bill and any other

legitimate charges growing out of the business, it was their duty to pay over to the owner the proceeds of any sale within a reasonable time after they received the same, and failing in this they were properly chargeable with interest upon any balance found unaccounted for.—*Youmans v. Heartt*, 397.

See AWARDS, 3: MORTGAGES, 3.

INTEREST IN LANDS.

See CHARGE TO THE JURY, 4.

INTERPRETATION.

See DESCRIPTION OF PROPERTY, 1, 2: EVIDENCE, 11, 12.

INTERVENING RIGHTS.

See CHATTEL MORTGAGES, 5-7: SWAMP LANDS, 1-3.

INTOXICATING LIQUORS.

See EVIDENCE, 27.

INVALID ASSESSMENT.

See VOLUNTARY PAYMENT, 1-5.

INVENTORY.

See ATTACHMENT, 5.

IN VIEW OF THE PROPERTY.

See EXECUTION SALES, 1, 2.

INVOLUNTARY PAYMENT.

See VOLUNTARY PAYMENT, 1-5.

IRREGULARITY.

See JUSTICE'S COURTS, 3: LOG-LIEN LAW, 3.

JOINDER.

See EQUITY PLEADING AND PRACTICE, 4.

JOINT OWNERS.

See RAILROADS, 1-3.

JOINT PLAINTIFFS.

See EJECTMENT, 3.

JUDGMENT.

See BAIL BONDS, 6: CERTIORARI: DAMAGES, 5: EJECTMENT,
1: EVIDENCE, 17: PRACTICE IN SUPREME COURT, 18: TAX
LIENS: WRIT OF ERROR, 1, 2.

JUDICIAL NOTICE.

See PRACTICE IN SUPREME COURT, 18.

JUDICIAL QUESTIONS.

See LEGISLATIVE ACTION, 1-3.

JURISDICTION.

See ATTACHMENT, 2: EMINENT DOMAIN, 3, 4, 7: HIGHWAYS,
1-3: JUSTICE'S COURTS, 3: LETTERS OF GUARDIANSHIP, 1,
2: LOG-LIEN LAW, 1-3: PROBATE COURTS.

JURY-ROOM INQUEST.

See EVIDENCE, 3-5.

JUSTICE OF THE PEACE.

See EVIDENCE, 17.

JUSTICE'S COURTS.

1. The condition of a replevin bond in justice's court is not satisfied by a return of the property, on a judgment in that court for defendant, and payment of the justice's costs, in a case where the plaintiff afterwards appeals, but it remains in force until the final disposition of the case, and it includes costs recovered by the defendant in the circuit on such appeal.—*Bradon v. Pierce*, 39.
2. The appeal bond given by the plaintiff, on his appeal of a replevin suit in justice's court, is a cumulative remedy in favor of the defendant, but it does not supersede or take the place of the replevin bond given on the institution of the suit.—*Ibid.*
3. In the absence of any statutory requirement, failure of a justice of the peace to wait an hour after the time specified in the process for the defendant to appear is at most but an irregularity, and not a jurisdictional defect open to collateral attack.—*Smith v. Brown*, 455.

See ATTACHMENT, 1-4.

JUSTICE'S JUDGMENTS.

See EVIDENCE, 17.

JUSTIFICATION.

See HIGHWAYS, 8.

KIND OF SERVICES.

See LOG-LIEN LAW, 2, 3.

KNOWLEDGE OF THE LAW.

See VOLUNTARY PAYMENT, 3.

LABOR PERFORMED.

See CONTRACTS, 2: IMPLIED PROMISE: LOG-LIEN LAW, 2, 3.

LACHES.

See FRAUD.

LAND CONTRACTS.

See CONTRACTS, 10-13, 18-20: EQUITY JURISPRUDENCE, 5-7.

LANDLORD AND TENANT.

See EJECTMENT, 5: RENTS, 4-7.

LANGUAGE USED.

See DESCENT OF PROPERTY, 3: WILLS, 6.

LAWFUL ACTS.

See ACTION ON THE CASE.

LEASE.

An agreement whereby one, in consideration of a promise to pay him four hundred dollars, lets to another a parcel of land for a year, agreeing to prepare the land and sow it to wheat, and authorizing the latter to enter the premises and harvest the same and do all things necessary to secure the crop, is a lease and not a mortgage; and under it the title to the wheat crop in question would be in the lessee, and not subject to attachment against the lessor.—*Stadden v. Hazzard*, 76.

LEAVE TO ANSWER.

See EQUITY PLEADING AND PRACTICE, 2.

LEGACIES.

See ESTATES OF DECEASED PERSONS, 4-6: WILLS, 1-6.

34 MICH.—76.

LEGAL TITLE.

See CHATTEL MORTGAGES, 4: ESTOPPEL, 6: TRESPASS, 3.

LEGISLATION.

1. There is a fatal defect in the statute under consideration, in that it makes no provision for the appointment of commissioners, and does not prescribe their duties, except by reference to certain sections of the plank road act, which are not broad enough to meet the requirements of this statute.—*Clay v. Pennoyer Creek Improvement Co.*, 204.
2. A statute thus adopting by reference parts of another statute must be construed precisely as if such adopted provisions had been embodied in it; and such a reference to a section of another statute cannot broaden or enlarge the scope of the language of such section beyond what it would import if literally reenacted in the new statute in the place it was designed to fill.—*Ibid.*
See SWAMP LANDS, 1-3.

LEGISLATIVE ACTION.

1. Where complaint is made that the original plan of a city improvement is so defective as to render the work dangerous when completed, the fault found is with legislative action, and a suit grounded upon it is grounded on a wrong attributable to the legislative body itself.—*Detroit v. Beckman*, 125.
2. The distinction in principle is pointed out between the case where the complaint is that the work must necessarily cause an injury to private property equivalent to an appropriation of some enjoyment thereof to which the owner is entitled, and a case where the fault found is with the plan, as not being the most wise and prudent to protect against accidents.—*Ibid.*
3. The extent to which the public authorities shall guard the citizen against dangers when he is making use of a highway or other public convenience is and must be a matter of discretion. The wisdom and propriety of local legislative action cannot be made a judicial question; it is and must be a political question, and can arise only between the legislator and his local constituency.—*Ibid.*

LEGISLATIVE POWER.

See TAXATION, 3, 7.

LESSOR.

See RENTS, 3.

LETTERS.

See EVIDENCE, 22.

LETTERS OF ADMINISTRATION.

See INSURANCE, 2.

LETTERS OF GUARDIANSHIP.

1. In an action of replevin for timber, where title is sought to be deduced in part through a guardian of minor heirs, the fact that the letter of guardianship, though the minors were shown to be over fourteen years of age, did not show in terms that the guardian was nominated by them, or that they were asked to nominate or to appear for that purpose, will not justify its exclusion as evidence.—*Burrows v. Bailey*, 64.
2. A letter of guardianship is in the nature of a certificate or commission, and in the absence of any statutory provision requiring it, it is not essential to its validity as evidence of the appointment, though it be preferable, that it should recite the mode and particulars of the nomination; and all reasonable presumptions must be indulged in favor of its having emanated regularly and after lawful proceedings.—*Ibid.*

LEVY.

See ATTACHMENT, 8: EQUITY JURISPRUDENCE, 2.

LIABILITY.

Of city: See DETROIT HOUSE OF CORRECTION, 1, 2.

Of principal: See AGENCY, 1-4.

LICENSE.

See DOGS, 1-4.

LIENS.

For purchase price: See EQUITY JURISPRUDENCE, 6, 7.

For taxes: See TAX LIENS.

See DAMAGES, 5: REPLEVIN, 7: TAXATION, 4.

LIFE INSURANCE.

See INSURANCE, 2-13.

LIMITATIONS.

See EJECTMENT, 4.

LIMIT OF RECOVERY.

See QUANTUM VALEBAT, 2-6.

LOANS.

See EVIDENCE, 36-39: HIGHWAYS, 4: TAXATION, 1, 2.

LOCAL ASSESSMENTS.

See TAXATION, 5, 6.

LOCOMOTION.

See HIGHWAYS, 10-12.

LOG CONTRACTS.

See CONTRACTS, 17.

LOG-LIEN LAW.

1. The proceedings under the log-lien law (*S. L. 1873, p. 466*) are special and must conform strictly to the statute; and the affidavit for attachment, therein provided for, is jurisdictional, and if it omits any material allegation which the statute requires, the writ will afford no protection to the officer executing it, and he will be guilty of conversion for seizing property upon it.—*Woodruff v. Ives, 320.*
2. An affidavit for such writ, which alleges that the plaintiffs performed labor upon the logs sought to be attached, but fails to specify the kind of labor or services performed, or to show that it was labor or services of the specific character prescribed by the statute, is fatally defective.—*Ibid.*
3. And such a defect is not a mere irregularity that will be waived by the defendants appearing in the suit and pleading to the merits.—*Ibid.*

LOGS.

See CONTRACTS, 17: LOG-LIEN LAW, 1-3: QUANTUM VALEBAT, 6.

LOSS.

Of collar: See DOGS, 4.

Of profits: See QUANTUM VALEBAT, 1, 2.

Of securities: See FORECLOSURES, 9, 10.

LUMBERING CONTRACTS.

See QUANTUM VALEBAT, 1-6.

MANDAMUS.

1. **Mandamus**, and not an action against the township, is the proper remedy to enforce payment of orders regularly drawn by the highway commissioners on the township treasurer: the duty of the township authorities to raise the necessary funds and to make payment, is just as imperative upon the presentation of such orders, as it would be after judgment against the township.—*McArthur v. Duncan*, 27.
2. **Mandamus** does not lie to compel a city to pay an unliquidated demand, such as a claim on a *quantum meruit* for the value to the city of services performed and materials furnished on a contract which was afterwards forfeited.—*Michigan Paving Company v. Common Council of Detroit*, 201.
3. **Mandamus** is denied where the record fails to show upon what papers the circuit judge based his action which is sought to be reviewed.—*Jones v. Judge of Kent Circuit*, 373.

MANSLAUGHTER.

See **CRIMINAL EXAMINATIONS**, 6.

MARRIAGE.

See **BIGAMY**, 1, 2.

MARSHALLING ASSETS.

See **EQUITY JURISPRUDENCE**, 16: **EQUITY PLEADING AND PRACTICE**, 15.

MATERIALS.

See **REPAIRS**.

MATTER OF COMPUTATION.

See **AWARDS**, 2.

**MATTERS EQUALLY WITHIN KNOWLEDGE OF
DECEDENT.**

See **EVIDENCE**, 43.

MEASURE OF DAMAGES.

See **BAIL BONDS**, 6: **DAMAGES**, 1-5: **QUANTUM VALEBAT**, 1-6.

MEETING.

See **HIGHWAYS**, 14.

MEMBERS OF DEFENDANT'S FAMILY.

See ATTACHMENT, 7.

MEMORANDUM.

See EVIDENCE, 28, 29.

MILL-DAMS.

1. A grant conveying the right to keep up a mill-dam at a specified height, and imposing no restrictions on the use, cannot be confined to the use then presently contemplated.—*Hathaway v. Mitchell*, 164.
2. While it is competent for grantors to limit the right of flowage to particular purposes, a grant in fee simple, as a general rule, cannot be restricted except by plain conditions.—*Ibid.*
3. The grant in question in this case is held to be in legal effect a grant of a certain quantity of water power, and the fact that it was to be immediately used for particular ends is not inconsistent with a change of uses, where no change is forbidden.—*Ibid.*

See EMINENT DOMAIN, 5-7: EQUITY JURISPRUDENCE, 10.

MILL PURPOSES.

See EMINENT DOMAIN, 5-7.

MINORS.

See DESCENT OF PROPERTY, 1-4: EJECTMENT, 4: GUARDIAN AND WARD, 1.

MISCONDUCT OF OFFICERS.

See DETROIT HOUSE OF CORRECTION, 1, 2.

MISREPRESENTATIONS.

See PROMISSORY NOTES, 11.

MISSTATEMENTS.

See BILL OF EXCEPTIONS.

MISTAKE.

See ESTATES OF DECEASED PERSONS, 4.

MISTAKES BY JURY.

See PRACTICE IN SUPREME COURT, 15.

MISTRESS.

See CONSIDERATION.

MODES OF SERVICE.

See ATTACHMENT, 1, 2.

MONEY.

Had and received: See CONTRACTS, 19, 20: DECLARATION, 1, 2:
SCHOOL DISTRICTS, 1.

Loaned: See EVIDENCE, 36, 37.

Paid into court: See GARNISHMENT.

MORTGAGEES.

See MORTGAGES: REPLEVIN, 6: RIGHT OF POSSESSION, 1, 2.

MORTGAGES.

1. A mortgage given by a guardian upon the property of his ward, by virtue of proceedings sought to be taken under the statute (*Comp. L. 1871, § 4626*), is void where the probate court nowhere in the course of the proceedings has specified or determined, as required by the statute, the amount, rate of interest, or length of time for which the mortgage was authorized to be given.—*Edwards v. Taliaferro*, 13.
2. One who has bought lands subject to a mortgage and has subsequently expressly recognized it by an agreement with the mortgagee for forbearance is not at liberty thereafter to dispute its existence or validity.—*Smith v. Graham*, 302.
3. An agreement in writing between a subsequent purchaser of mortgaged lands and the mortgagee, for the payment of an increased rate of interest after due, in consideration of an extension of time, is held sufficient under the statute of frauds to charge the land, where no rights of third persons intervene.—*Ibid.*
4. There having been an honest difference between the parties regarding their rights, the statutory penalty is not imposed upon defendant for refusing to discharge the mortgage after it had been satisfied.—*Burrows v. Bangs*, 304.
5. The purchaser of a mortgage is held bound by such notice as the registry afforded of another mortgage of the same date, but subsequently recorded, of which his vendor had actual knowledge.—*Van Aken v. Gleason*, 477.
6. Where two mortgages bear even date, it cannot be claimed that the earlier acknowledgment of the one latest recorded would necessarily show it was intended or given as a first security.—*Ibid.*

7. A mortgagee having turned over to his wife a mortgage and note in satisfaction of claims held by her against him, and having afterwards formally assigned the same, without delivery, to a third person, the mortgagor having made payment to the wife and taken up the mortgage, was granted an injunction restraining such subsequent assignee from proceeding to foreclose the mortgage.—*Haesctg v. Brown*, 503.
8. One who buys securities which are not delivered to him, making only a nominal payment prior to his receiving notice of another's interest therein, is not entitled to protection as a *bona fide* purchaser.—*Ibid.*
9. The fact that the mortgagor, on making payment to the wife, demanded and received indemnity against loss thereby, knowing that another made claims to the mortgage, is not a suspicious circumstance, nor is it conclusive evidence of want of confidence in the validity of the claim set up by the wife.—*Ibid.*

See EQUITY JURISPRUDENCE, 16: EQUITY PLEADING AND PRACTICE, 15: FORECLOSURES, 1-10: LEASE: PAYMENT, 1-3: RIGHT OF POSSESSION, 1, 2.

MOTIONS.

For new trial: See BANKS, 4: PRACTICE IN SUPREME COURT, 15.
 To quash information: See CRIMINAL EXAMINATIONS, 6.
 To strike out: See EVIDENCE, 22.

MULTIFARIOUSNESS.

See FORECLOSURES, 5.

MURDER.

See CRIMINAL EXAMINATIONS, 6.

MUTUAL AGENT.

See SETTLEMENTS, 1, 2.

MUTUALITY.

See CORPORATIONS, 4.

MUTUAL PAYMENTS.

See CONTRACTS, 3.

NAVIGABLE STREAMS.

See EMINENT DOMAIN, 1-4, 6: NUISANCES, 2-5: RIPARIAN OWNERS.

NEGATIVE TESTIMONY.

See EVIDENCE, 44.

NEGLECT OF DUTY.

See COUNTY TREASURERS, 3.

NEGLIGENCE.

1. Negligence cannot be presumed, but must be affirmatively proved; and it cannot be presumptively negligent to run a railroad train in the usual manner, in the absence of proof that such usual manner is in itself improper.—*Grand Rapids & Ind. R. R. Co. v. Judson*, 506.
2. In an action to recover from a railroad company damages for injuries to horses, claimed to have arisen from neglect to keep up proper cattle-guards, there being some testimony admitted without objection and having some tendency to prove the cattle-guard insufficient, the submission of the question to the jury is held not to be error; a court of review will not consider the weight of evidence on writ of error.—*Ibid.*

See BANKS, 2-4: HIGHWAYS, 12, 13: PROMISSORY NOTES, 14-16: RAILROADS, 4, 5.

NEGOTIATIONS FOR AN EXTENSION.

See PRINCIPAL AND SURETY.

NEW AGREEMENT.

See MORTGAGES, 3.

NEW GROUNDS.

See PRACTICE IN SUPREME COURT, 4.

NEW TRIAL.

See BANKS, 4: EJECTMENT, 1, 2.

NOMINATION.

See LETTERS OF GUARDIANSHIP, 1, 2.

NONAGE.

See BURDEN OF PROOF, 2.

NON-DELIVERY.

See QUANTUM VALEBAT, 6.

34 MICH.—77.

NON-JOINDER.

See RENTS, 1.

NON-PERFORMANCE.

See COUNTY TREASURERS, 3: QUANTUM VALEBAT, 1-6.

NOTICE.

See BANKS, 1-4: CHATTEL MORTGAGES, 1-3: EVIDENCE, 31: HIGHWAYS, 1-3, 14: INSURANCE, 13: INTEREST, 1: MORTGAGES, 5, 6, 8: PROMISSORY NOTES, 1-6: SCHOOL DISTRICTS, 2.

NOTICING FOR HEARING.

See PRACTICE IN SUPREME COURT, 9.

NOVATION.

See FORECLOSURES, 4.

NUISANCES.

1. A purpresture may be defined as an enclosure by a private party of a part of that which belongs to and ought to be open and free to the enjoyment of the public at large; but a purpresture is not necessarily a public nuisance. A public nuisance must be something which subjects the public to some degree of inconvenience or annoyance; but a purpresture may exist without putting the public to any inconvenience whatever.—*Attorney General v. Ewart Booming Co.*, 462.
2. There is a plain distinction between the highway by land, with its definite limits to which the public right extends whether the whole is used or not, and the highway for floatage in small streams, where the public rights have no definite limitations of space except as practicability for use and the occasion for use may give variable limits as the seasons and the needs of business and traffic may change.—*Ibid.*
3. The private appropriation of a part of the bed of a small stream not navigable except for floatage, is neither a purpresture nor a nuisance, nor a public grievance of any sort, unless the public use is thereby unreasonably abridged or inconvenienced.—*Ibid.*
4. Some appropriation of the bed of the stream being essential to the reasonable operation of booming companies, the public, in authorizing by general law the organization of such companies and regulating their operation, must be deemed to have waived its right to complain of an appropriation

which is not unreasonable; nothing can be a nuisance which the sovereign authority allows, especially when the allowance is on public grounds, and made to facilitate the use of that which is common to all.—*Ibid.*

5. The question of lawfulness in the action of a booming company in enclosing part of the stream for its own purposes is one depending on the particular facts: whether the general public desiring to avail themselves of the navigable rights are more inconvenienced than accommodated thereby; and inconvenience to another booming company occupying the same stream cannot be made the test of whether such action constitutes a public nuisance.—*Ibid.*

See HIGHWAYS, 13.

OBJECTIONS.

See PRACTICE IN SUPREME COURT, 4, 10, 12.

OBJECTOR EQUALLY AT FAULT.

See EJECTMENT, 3.

OBLIGEE.

See BAIL BONDS, 1.

OBSTRUCTIONS.

See HIGHWAYS, 6, 15.

OFFENSE CHARGED.

See CRIMINAL EXAMINATIONS, 2-6.

OFFICER.

See ATTACHMENT, 5: BAIL BONDS, 1, 4: CORPORATIONS, 1: COUNTY TREASURERS, 1-3: DETROIT HOUSE OF CORRECTION, 1, 2: EXECUTION SALES, 3: SEARCH WARRANT, 1-3.

OFFICIAL ACTS.

See SEARCH WARRANT, 1-3.

OFFICIAL BOND.

See COUNTY TREASURERS, 2, 3: SCHOOL DISTRICTS, 1.

OFFICIAL CHARACTER.

See BAIL BONDS, 4.

OFFICIAL CUSTODY.

See GARNISHMENT.

OFFICIAL DUTY.

See COUNTY TREASURERS, 1-3.

OFFICIAL TREASURER.

See BILL OF PARTICULARS: SCHOOL DISTRICTS, 3.

OMISSIONS.

See REFEREES, 2.

OPINIONS.

See EVIDENCE, 5, 25.

OPTION.

See BAIL BONDS, 8.

ORAL AGREEMENTS.

See CONTRACTS, 7, 10-13, 18-20.

ORAL INSTRUCTIONS.

See PRACTICE IN SUPREME COURT, 10.

ORDERS.

See MANDAMUS, 1.

ORDINANCE.

See REPAIRS.

OWNERSHIP.

See EVIDENCE, 40-44: PAYMENT, 2, 3.

PARAMOUNT TITLE.

See FORECLOSURES, 6.

PAROL AGREEMENTS.

See CHARGE TO THE JURY, 4: CONTRACTS, 10, 11.

PAROL EVIDENCE.

See CONTRACTS, 10, 11: EXECUTION SALES, 3.

PARTIAL CONDEMNATION.

See RAILROADS, 1-3.

PARTICIPANT.

See EVIDENCE, 19.

PARTICULAR USE.

See TRESPASS, 4.

PARTIES.

See EQUITY PLEADING AND PRACTICE, 1, 4, 11: FORECLOSURES, 3, 5-8, 11-13; RAILROADS, 1-3.

PARTNERSHIP.

1. A wife holding a lawful and just claim against a firm of which her husband is a member, is not precluded from recovering upon it because of any incidental wrong that may result to one of the other members of the firm in consequence of an alleged fraud of her husband to which she was in no wise a party; there is no rule of law compelling a wife to assume the consequences of her husband's frauds, or to guaranty his good conduct.—*Moore v. Foote*, 443.
2. A firm having given a non-negotiable due-bill to one of its members for money borrowed of him, the delivery thereof to his wife as payment upon a debt due from him to her transfers the title and authorizes her to enforce payment, notwithstanding the amount stands credited to the husband on the books of the firm; but the due-bill being non-negotiable, a settlement of the matter with the husband by the firm without knowledge of its transfer would probably be a complete defense.—*Ibid.*
3. Where such due-bill has been given up to the firm and their note taken for the amount by an arrangement between the creditor and her husband, the fact that the credit still remains to the husband on the books of the firm, and the allowance thereof in his favor in a subsequent settlement of the partnership matters, cannot prejudice the claim of the wife upon the note.—*Ibid.*
4. In a dealing between a wife who is a creditor of a firm and her husband who is a member of the debtor firm, in reference to an exchange of a due-bill held by her against the firm for a firm note, the husband is in no proper sense the wife's agent; and her rights in the matter are precisely what those of any other creditor dealing in like manner would be.—*Ibid.* See APPLICATION OF PAYMENTS, 1-3; DECLARATION, 5; PROMISSORY NOTES, 6.

PARTNERSHIP NAME.

See DECLARATION, 5.

PART PAYMENT.

See CONTRACTS, 20.

PART PERFORMANCE.

See CONTRACTS, 20.

PARTY IN INTEREST.

See CONTRACTS, 7.

PATENTS.

See EQUITY JURISPRUDENCE, 11: EVIDENCE, 26.

PAUPERS.

See DIRECTORS OF THE POOR: WRIT OF ERROR, 1.

PAYMENT.

1. Complainant negotiated with defendant for a loan of \$2,000 to enable him to pay off two mortgages on his farm, one for \$600, and one for \$1,000, the latter held by one McGinnis, and past due but payment not required for three months to come; defendant was willing to loan the amount only on a first mortgage on the farm, but on applying to his banker for the funds, the banker, though owing him more than the amount, could not well pay the whole sum at once, and it was therefore arranged that one-half should be paid down, and turned over to complainant, out of which the \$600 mortgage was to be satisfied; that complainant should give defendant a mortgage on the farm for \$2,000, and that the banker should give his certificate of deposit for \$1,000 payable to the order of complainant when the McGinnis mortgage should be discharged; the banker failed before the day at which it was arranged the McGinnis mortgage was to be paid, and the certificate became worthless; complainant paid back the thousand dollars received from defendant, with the interest thereon, and tendered him the certificate of deposit and required a discharge of his mortgage, which being refused he filed this bill to have the mortgage declared satisfied:—

Held, That there being no express agreement that complainant should receive the certificate as payment, and the fair inference from all the facts being that it was only held by him as collateral and not as payment, the loss upon the

certificate should be borne by defendant, and complainant should have the relief prayed.—*Burrows v. Bangs*, 304.

2. In such case the fact that defendant after the giving of this certificate of deposit settled with the banker on the basis of a credit to the latter for the amount thereof could have no bearing on the question of whose risk the certificate was held at, for the banker should, as between him and defendant, be credited with the amount of the certificate while it was outstanding, no matter who owned it.—*Ibid*.
3. Nor does the fact that complainant attempted to get the money on the certificate before the day fixed tend to show an understanding that he considered the certificate as being held at his risk.—*Ibid*.

See APPLICATION OF PAYMENTS, 1-3: CONTRACTS, 1-3, 20: ESTATES OF DECEASED PERSONS, 6; EVIDENCE, 21: GUARDIAN AND WARD: MORTGAGES, 7-9: PARTNERSHIP, 2: VOLUNTARY PAYMENT, 1, 5.

PECUNIARY ABILITY OF PLAINTIFF.

See EVIDENCE, 37.

PENALTIES.

See INSURANCE, 7, 9: MORTGAGES, 4: SEARCH WARRANT, 2.

PENDENCY OF WRIT OF ERROR.

See EJECTMENT, 2.

PERCENTAGE OF UPPERS.

See CONTRACTS, 17.

PERFORMANCE.

See CONTRACTS, 16, 20, 21: DECLARATION, 1, 2: FINDING OF FACTS, 3: INTEREST, 1: QUANTUM VALEBAT, 1-6: SETTLEMENTS, 1, 2.

PERMISSION.

See EQUITY PLEADING AND PRACTICE, 9, 11.

PERSONAL LIABILITY.

See FORECLOSURES, 1, 2.

PERSONAL PROPERTY.

See EQUITY JURISPRUDENCE, 3, 4.

PERSONAL SERVICE.

See ATTACHMENT, 1-3.

PETITION.

See EMINENT DOMAIN, 3-7.

PHOTOGRAPHIC COPIES.

See EVIDENCE, 2.

PHYSICIAN.

See DIRECTORS OF THE POOR.

PLACE.

See EXECUTION SALES, 1, 2.

PLAINTIFF IN DEFAULT.

See QUANTUM VALEBAT, 1-6.

PLEA.

1. A prior suit pending in which there can be no recovery because it was prematurely brought, is no bar to a recovery in a new suit for the same cause of action.—*Blackwood v. Brown*, 4.
2. The corporate existence of the plaintiff is admitted by the plea of the general issue.—*Garton v. Union City National Bank*, 279.
3. While the plea of the general issue waives technical and formal objections to the declaration, it does not waive the essential allegations of a cause of action.—*Stofet v. Marker*, 313.

See DECLARATION, 4: INSURANCE, 13: LOG-LIEN LAW, 3: RENTS, 1.

POLICY.

See INSURANCE, 1, 7, 9, 10.

POLITICAL QUESTIONS.

See LEGISLATIVE ACTION, 3.

POSSESSION.

See ATTACHMENT, 9: FORECLOSURES, 8: MORTGAGES, 8, 9:
RIGHT OF POSSESSION, 1, 2: SPECIAL QUESTIONS TO JURY,
4: SWAMP LANDS, 11: TRESPASS, 3.

POSSIBLE DEFENSES.

See PROMISSORY NOTES, 4.

POWER TO MAKE RULES.

See SUPERIOR COURT OF DETROIT, 1-4.

PRACTICE IN CIRCUIT COURTS.

1. It is competent in a proper case to take an inquest under circuit court rule 99, against a corporation defendant where no affidavit of merits has been filed.—*G. R. F. M. Co. v. Burnham*, 29.
2. An affidavit under rule 79, which, while admitting the signature to the note declared upon appeared to be defendant's genuine signature, avers that the same was obtained under circumstances, fully set forth, which would render him not liable thereon, is held sufficient to put the plaintiff to the proof of the execution and delivery of the note sued upon.—*Anderson v. Walter*, 113.
3. A concession on the trial that the defendant, a city, is liable for the injury complained of, is but the admission of a rule of law, and the court is not bound to accept and act upon it if satisfied that there was in fact no right of action.—*Detroit v. Beckman*, 125.
4. It is within the discretion of the trial judge to decline to rule upon broad and general statements of counsel as to what he offers and proposes to prove, and to require questions to be put to be passed upon separately in the usual and customary manner.—*Lange v. Kaiser*, 317.

See BILL OF PARTICULARS: DECLARATION, 4: EJECTMENT, 1: EQUITY PLEADING AND PRACTICE, 1-5: EVIDENCE, 3-5: FINDING OF FACTS, 2: INSURANCE, 13: PLEA, 2: PRACTICE IN SUPREME COURT, 18: REFEREES, 1, 2: TRESPASS, 1.

PRACTICE IN SUPREME COURT.

1. Where in a suit by a foreign corporation upon a premium note, the plaintiff, as part of its case, introduced evidence of its authority to do business in Michigan, a court of review may legitimately assume, though the record does not otherwise disclose it, that the contract of insurance was made in Michigan.—*American Ins. Co. v. Woodruff*, 6.
2. But where objection taken to the admission in evidence of the note sued upon, on the ground that there had been no showing that plaintiff was authorized to do business in Barry county, was overruled and no reason given, it will not be presumed against this ruling, in the absence of anything

- in the record to show it, that the contract of insurance was made in that county, though the plaintiff's course of proof indicates it was made in Michigan.—*Ibid.*
3. Nothing will be presumed against the correctness of a ruling, which does not appear by the record.—*Ibid.*
 4. New grounds of objection cannot be put forward in a court of review which were not distinctly made in the court below or fairly brought to the judge's attention.—*Howry v. Eppinger*, 29.
 5. Where the court has left the question of the legal effect of a written instrument to the jury, their verdict will not be disturbed on review where upon a proper construction of the instrument no different verdict could, consistently with the other facts involved and determined by the verdict rendered, have been properly found; such a ruling could not have been prejudicial to the party complaining of it.—*Stadden v. Hazard*, 76.
 6. On reversing the judgment because of the iniquity of the transactions out of which the claim arises, costs will not be awarded to the plaintiff in error for being successful in a defense based on his own turpitude.—*Williams v. Guards*, 82.
 7. Assignments of error not discussed by counsel for plaintiff in error in the brief submitted are considered as abandoned.—*Roberts v. Wilkinson*, 129.
 8. Where the attorneys of record in the court below are retained as counsel for defendant in error in the supreme court, no formal notice of appearance is required; and counsel for plaintiff in error should recognize and treat the attorneys who appeared of record for the defendant in error in the court below, as his counsel in the supreme court, unless otherwise informed by actual notice.—*Frost v. Lawler*, 235.
 9. A defendant in error who notices the cause for hearing, thereby waives any right to complain of failure to serve upon him a copy of the assignment of errors.—*Ibid.*
 10. A judgment will not be reversed on the ground that part of the charge to the jury was oral, notwithstanding a statutory requirement that it be reduced to writing, where no objection is raised on that ground until after the jury had gone out. The point was waived.—*Garton v. Union City National Bank*, 279.
 11. A general exception to the charge to the jury is insufficient, where the charge is not confined to a single question, but covers several distinct and separate matters; in such case the exception must be special and point out the specific matter complained of.—*Lange v. Kaiser*, 317.
 12. It is too late on review to assign reasons for an objection to the admission of evidence, for which none were assigned on the trial.—*Campbell v. People*, 351.

13. An exception to the refusal to give a request to charge on the weight to be given to evidence of good character on a trial for crime, which was not improper in itself, is not sustained where the charge as given on the subject was not essentially different in substance, and was calculated to ensure to the respondent the full benefit of his good reputation.—*Ibid.*
 14. The refusal to grant a request to charge, that there was no evidence to establish a specified fact, cannot be held error where the bill of exceptions does not affirmatively show that no such evidence was given. Error will not be presumed.—*Curley v. Wyman*, 353.
 15. A court of review cannot correct mistakes made in computation by a jury; such matters should be presented to the trial court on motion for a new trial.—*Youmans v. Heartt*, 397.
 16. A refusal to submit the facts to the jury upon one branch of plaintiff's claim because of defects in the declaration is held not error of which the plaintiff can complain where it is made to appear by the record that there was a fatal gap in his evidence.—*Supervisors of Houghton County v. Rees*, 481.
 17. A court of review will not consider on error any question not brought to the attention of the court below and not raised by any assignment of error.—*Waterman v. Waterman*, 490.
 18. The failure to file an affidavit for a default cannot be taken advantage of on error, such affidavit being no part of the record; the purpose of this affidavit being but to inform the court of that of which he is bound to take judicial notice, *i. e.*, that no plea had been filed, it is not error to order judgment without it.—*Leonard v. Woodward*, 514.
- See CERTIORARI: EMINENT DOMAIN, 1: EQUITY JURISPRUDENCE, 9: EVIDENCE, 22: FINDING OF FACTS, 1, 2: MANDAMUS, 1-3: NEGLIGENCE, 2: STIPULATIONS: TRESPASS, 2: WRIT OF ERROR, 1, 2.

PRAYER.

See EQUITY PLEADING AND PRACTICE, 8.

PRELIMINARY NEGOTIATIONS.

See EVIDENCE, 24.

PREMIUM NOTE.

See INSURANCE, 1: PRACTICE IN SUPREME COURT, 1, 2.

PREPARATORY ACTS.

See CONTRACTS, 20.

PREPONDERANCE.

See **BURDEN OF PROOF**, 1, 2.

PRESENTMENT BY GRAND JURY.

See **CRIMINAL EXAMINATIONS**, 1.

PRESUMPTIONS.

See **ATTACHMENT**, 7: **AWARDS**, 1, 3: **COUNTY TREASURERS**, 3:
FALSE IMPRISONMENT, 2: **LETTERS OF GUARDIANSHIP**, 2:
NEGLIGENCE, 1: **PRACTICE IN SUPREME COURT**, 1-3, 14.

PRINCIPAL AND AGENT.

See **AGENCY**, 1-4.

PRINCIPAL AND SURETY.

Where the principal debtor requests an extension of the time of payment by a letter accompanied by an enclosure as a consideration for the extension, which is not agreed to by the creditor, though he keeps the enclosure and applies it upon the debt without responding to the letter, the surety is not thereby released.—*Garton v. Union City National Bank*, 279.

PRIOR DEED.

See **DEEDS**, 3.

PRIOR HOLDERS.

See **PROMISSORY NOTES**, 5.

PRIORITY.

Of acknowledgment: See **MORTGAGES**, 6.

Of registry: See **EVIDENCE**, 12-15.

PRIOR SUIT PENDING.

See **PLEA**, 1.

PRIOR UNRECORDED DEED.

See **EVIDENCE**, 12-15.

PRISONERS.

See **DETROIT HOUSE OF CORRECTION**, 1, 2.

PRISONS.

All criminal prisons are and must be public and not private places of detention, and no imprisonment can be lawful that is not authorized by public laws.—*Detroit v. Laughna*, 402.

See DETROIT HOUSE OF CORRECTION, 1, 2.

PRIVATE APPROPRIATION.

See NUISANCES, 3-5.

PRIVATE INJURY.

See EQUITY JURISPRUDENCE, 15.

PRIVATE INTERFERENCE.

See FALSE IMPRISONMENT, 2.

PRIVATE STREAMS.

See EMINENT DOMAIN, 2.

PRIVATE WAYS.

See HIGHWAYS, 15.

PROBABLE PURPOSES.

See WILLS, 2.

PROBATE COURTS.

In order to entitle wills probated abroad to be admitted to probate here, the copy of the will presented must be accompanied by the foreign probate and due authentication thereof, and these together constitute the one instrument or subject matter to be acted upon under the statute, and all are essential to authorize the probate court to exercise the jurisdiction.—*Pope v. Cutler*, 150.

See ESTATES OF DECEASED PERSONS, 1-6: LETTERS OF GUARDIANSHIP, 1, 2: MORTGAGES, 1.

PROCEEDINGS TO CONDEMN LANDS.

See EMINENT DOMAIN, 5-7: HIGHWAYS, 1-3: RAILROADS, 1-3.

PROCEEDS.

Of sales: See CHATTEL MORTGAGES, 4: INTEREST, 2.

PROCESS.

See ATTACHMENT: SEARCH WARRANT, 1-3.

PRODUCTION.

Of memorandum: See EVIDENCE, 28, 29.

Of securities: See FORECLOSURES, 9, 10.

PROFITS.

See QUANTUM VALEBAT, 1.

PROMISE.

See CONTRACTS, 8, 21.

PROMISSORY NOTES.

1. The words "secured by mortgage" written upon a promissory note form no part of the note, and do not operate to limit or impair its value; nor are they sufficient to notify third parties of the contents of the mortgage, or that it contained some clause inconsistent with the note, or to put them on inquiry. If it be the intent to limit the effect of the note by the terms or conditions of the mortgage securing its payment, language appropriate to express it must be employed.—*Howry v. Eppinger*, 29.
2. Where a note purporting to be secured by mortgage has been endorsed in blank by the payee and put into the hands of an agent to dispose of, the purchaser having notice of the contents of the mortgage, which showed that the mortgagee was a different person from the payee of the note or the seller, would not be bound thereby to surmise that such seller had obtained the note wrongfully and had no authority to part with it, nor would such notice be sufficient to put him on inquiry.—*Ibid.*
3. A purchaser of notes endorsed in blank from an agent with full authority to sell cannot be prejudiced by any violation by the agent of his instructions as to the manner of making the sale, or as to the disposition of the proceeds, where the purchaser had no notice of such instructions; beyond the apparent general right with which such agent is thereby clothed, third parties would not be bound to inquire.—*Ibid.*
4. It is not the duty of parties about to purchase negotiable paper to make inquiries not required by good faith as to possible defenses of which they have no notice, either from anything appearing on the face of the paper, or from facts communicated to them at the time.—*Ibid.*
5. Where an agent in possession of promissory notes endorsed in blank, with full authority to negotiate them, has turned them out as collateral to advances made and to be made to him, and has afterwards directed their sale, a *bona fide* pur-

- chaser would not be affected in any way by the state of the account between his vendor and such agent as to the advances.—*Ibid.*
6. Where a firm have received, as collateral to advances, notes endorsed in blank, from an agent having authority to sell the same, and such agent afterwards instructs them to sell, another firm, one of whom is a member of both firms, may become *bona fide* purchasers of the paper and entitled to protection as such; there is nothing in such a connection between two firms that would necessarily preclude a sale in good faith from one to the other where neither had notice of any thing wrong.—*Ibid.*
 7. One who receives from his debtor, as collateral, negotiable paper of a third person, endorsed by the debtor, if he neglects to protest it for non-payment, thereby makes the paper his own and releases his debtor's endorsement.—*Whitten v. Wright, 92.*
 8. There is no distinction, in the applicability of this doctrine, between promissory notes and drafts.—*Ibid.*
 9. Evidence in such case that the endorser suffered no injury from the failure to protest, as the maker was insolvent when the note was given and had been ever since, is incompetent. It is of the utmost importance that no uncertainty should exist as to the rights and liabilities of parties to negotiable paper.—*Ibid.*
 10. The value of a note depends not alone upon the solvency of the maker, but equally as much upon his integrity and business habits.—*Ibid.*
 11. The exclusion of evidence of the insolvency of the maker, and of a letter from defendant to plaintiff concerning his solvency, offered to make out a case of fraudulent misrepresentations, is not error where the offer does not include a proposal also to show that defendant knew the statements in the letter to be untrue.—*Ibid.*
 12. Any right of action based upon a warranty by the indorser of the solvency of the maker is not within the issue of an action brought in the ordinary way upon the note.—*Ibid.*
 13. In an action upon a promissory note, where the only controversy relates to whether an erasure of the words "after due" in the printed form, following the rate of interest, was made after or before the execution of the note, and evidence has been introduced both pro and con on this subject, it is error to charge the jury that the burden of proof on this question is upon the defendant; on the contrary, the burden of proof is on the plaintiff to show that the note in the shape in which he produces it and has declared upon it was in fact executed and delivered by the defendant.—*Willett v. Shepard, 106.*

14. While there may be cases where one signing and putting in circulation an instrument should be bound by the terms thereof, even though it turned out different from what he supposed it to be, this rule does not go so far as to require a party signing in good faith what he has heard read, and what purports to be a power of attorney, contract, deed, mortgage, or similar instrument, to be held liable in case a negotiable note of that date, of which he had no notice or intimation, should have been mysteriously lurking in the depths of the instrument so signed, and should afterwards turn up with his signature attached to it.—*Anderson v. Waller*, 113.
 15. In an action upon a promissory note, where the evidence on plaintiff's behalf tends to show that defendant knowingly and deliberately signed and delivered the note at the same time that he executed two other papers, and that on defendant's behalf, that only the two other papers, duplicate agency contracts, were executed or mentioned or read to him, and that there was no talk of a note, and no note shown or signed, there is no basis for presenting to the consideration of the jury the question of the effect of defendant's negligence in signing and putting in circulation the note in question.—*Ibid.*
 16. Where a party to an instrument undertakes to read it over in the presence and hearing of the other party thereto, in order that he may understand its contents before signing it, the party reading is both legally and morally bound to read it correctly, and the other interested party has a right to rely upon its being so read, and is not guilty of negligence in signing it without further examination.—*Ibid.*
 17. A promissory note made payable to C. T. Allen, cashier, or order, indicates that it was made to him not as an individual, but as a bank officer, and that it was a contract with the bank; and in a suit upon it by the bank no indorsement by such cashier is necessary to the admission of the note in evidence.—*Garton v. Union City National Bank*, 279.
 18. Where a promissory note contains on its face a memorandum that it is to be used as collateral security to other notes, it is competent in an action upon it to show the true consideration and the identity, nature and amount of the demands to which it was collateral.—*Ibid.*
- See CONTRACTS, 1-6, 10: DECLARATION, 5: EVIDENCE, 7, 8: INSURANCE, 1: PARTNERSHIP, 3, 4: PRACTICE IN CIRCUIT COURTS, 2: PRACTICE IN SUPREME COURT, 1, 2.

PROMPT PAYMENT.

See BANKS, 5.

PROOF OF SERVICE.

See HIGHWAYS, 2.

PROOFS OF DEATH.

See INSURANCE, 3, 4.

PROPERTY.

See DOGS, 2.

PRO RATA APPLICATION.

See APPLICATION OF PAYMENTS, 3.

PROSECUTRIX.

See RAPE.

PROSTITUTION.

See CONSIDERATION.

PROTECTION.

See SEARCH WARRANT, 1-3.

PROTEST.

See VOLUNTARY PAYMENT, 1, 5.

PUBLIC CONVENIENCES.

See LEGISLATIVE ACTION, 1, 3.

PUBLIC GRIEVANCE.

See EQUITY JURISPRUDENCE, 13, 15: EQUITY PLEADING AND PRACTICE, 14: NUISANCES, 3-5.

PUBLIC IMPROVEMENTS.

See LEGISLATIVE ACTION, 1-3.

PUBLIC LAWS.

See PRISONS.

PUBLIC MATTERS.

See FALSE IMPRISONMENT, 2.

PUBLIC NUISANCE.

See NUISANCES, 1-5.

34 MICH.—79.

PUBLIC PLACES OF DETENTION.

See PRISONS.

PUBLIC POLICY.

See CONSIDERATION.

PUBLIC PURPOSES.

See TAXATION, 3.

PUBLIC RIGHT.

See EQUITY JURISPRUDENCE, 14, 15.

PUBLIC USE.

See HIGHWAYS, 9: TAXATION, 1-2.

PURCHASER.

At foreclosure sale: See FORECLOSURES, 13.

In good faith: See BONA FIDE PURCHASER.

Of United States: See SWAMP LANDS, 1-3.

PURPOSES.

See EQUITY JURISPRUDENCE, 10: MILL DAMS, 1-3.

PURPRESTURES.

See NUISANCES, 1, 3.

QUALITIES.

See CONTRACTS, 17.

QUANTITY.

See MILL DAMS, 1-3.

QUANTUM MERUIT.

See CONTRACTS, 2: DAMAGES, 1: MANDAMUS, 2.

QUANTUM VALEBAT.

1. Under a lumbering contract the vendor, who has come short of complete performance and detained some logs that were ready for delivery, is held not entitled to recover for profits which would have accrued to him had he cut and delivered the contract quantity of logs, upon the claim that he was disabled from getting the full quantity by reason of the pur-

- chaser's failure to advance as he agreed.—*Chapman v. Dease*, 375.
2. Where under a lumbering contract the purchaser has been in fault in the times and amounts of his advances, but which have nevertheless been received, and the vendor has been in fault in the quantity and quality of the logs delivered, which however, have been accepted and appropriated by the purchaser, the vendor may recover the value, not exceeding the contract price, of the logs so delivered and accepted and not paid for by the advances, less any damages suffered by the purchaser by reason of the vendor's default.—*Ibid.*
 3. The limit of recovery in such case could not exceed either the contract price or the true value at the time and place of delivery and acceptance.—*Ibid.*
 4. The recovery on the *quantum valebat* for the value of chattels delivered and accepted in pursuance of a contract which the plaintiff has failed to completely perform on his part, is not based on the contract, but upon the benefit which the defendant has received from the appropriation of the property of the plaintiff.—*Ibid.*
 5. The plaintiff's recovery in such an action being upon the basis of the true value of the property delivered and accepted, the defendant would not be entitled by way of recoupment to have this value reduced by the excess in value of the contract quality, but would be permitted to set up a counter claim for the difference between the contract price and the market value of the contract quality of the amount so delivered.—*Ibid.*
 6. A vendee in a lumbering contract, who has failed to make advances according to his contract, cannot, when sued by his vendor on the *quantum valebat* for logs delivered and appropriated, recoup damages for the non-delivery of logs which by such default the vendor was disabled from delivering.—*Ibid.*

QUESTIONS OF FACT.

See FINDING OF FACTS, 1: HIGHWAYS, 13: NEGLIGENCE, 2.

QUESTIONS OF LAW.

See EVIDENCE, 11, 12, 16: PRACTICE IN SUPREME COURT, 5.

RAILROADS.

1. It is requisite in proceedings to condemn land for railroad purposes, where the whole parcel is required and found necessary, to have all the tenants in common thereof before the court; and it is not competent to proceed separately against

- the owners of an undivided interest while another undivided interest remains outstanding.—*G. R., N. & L. S. R. R. Co. v. Alley, 16.*
2. And the dismissal of such proceedings as to a portion of the joint owners, for want of service, is practically a dismissal as to all, since it leaves the court without power to proceed further with the inquest.—*Ibid.*
 3. Under a statute requiring all parties interested to be brought in, it is not competent, in proceedings to condemn land, to dismiss as to a portion of the joint owners and proceed as to others; a partial condemnation of an undivided interest can furnish no benefit to a railroad in building its track.—*G. R., N. & L. S. R. R. Co. v. Alley, 18.*
 4. A railroad fence being discovered on fire about six or seven o'clock in the evening, and the section foreman, getting notice thereof at about eight o'clock that evening, having proceeded the next morning before six o'clock to repair the same as soon as practicable from the nearest materials belonging to the company, which were about half a mile distant, it was held the company were not guilty of a breach of their duty under the statute, to repair the same without unreasonable delay.—*Stephenson v. Grand Trunk R. W. Co., 323.*
 5. In an action to charge a railroad company for want of reasonable diligence in repairing the fence destroyed under such circumstances, it is not error to exclude evidence that the repairs might have been more quickly made of suitable materials which were near at hand, but which it is conceded did not belong to the company, and which were not shown to have been available to it for that purpose.—*Ibid.*
- See CONTRACTS, 14: EVIDENCE, 24, 25: FINDING OF FACTS, 3: NEGLIGENCE, 1, 2.

RAPE.

On the trial of a charge of rape, where the case turns almost wholly upon the testimony of the prosecutrix, a wide latitude should be allowed on cross-examination as to facts having a legitimate bearing on the question whether the act imputed to defendant was against her will; and where the proofs were not very decided upon the fact of resistance, it was held error to exclude inquiries on cross-examination as to whether the prosecutrix voluntarily made statements of the transaction, and whether she prosecuted the defendant of her own motion or at the instigation of others.—*Rogers v. People, 345.*

See ASSAULT WITH INTENT TO RAVISH.

RATABLE APPLICATION OF PROCEEDS.

See EQUITY JURISPRUDENCE, 15.

RATIFICATION.

See AGENCY, 2.

READING.

See CONTRACTS, 9.

REAL ESTATE.

See CHARGE TO THE JURY, 4: CONTRACTS, 10-13, 15, 16, 18, 21: COUNTY TREASURERS, 1-3: DEEDS, 1-5: DESCENT OF PROPERTY, 1-4: FORECLOSURES: LEASE: MORTGAGES: RENTS: RIGHT OF POSSESSION: RIPARIAN OWNERS: SWAMP LANDS: TAX LIENS: TAX TITLES: TRESPASS.

REASONABLE APPROPRIATION.

See NUISANCES, 4.

REASONABLE DILIGENCE.

See RAILROADS, 4, 5.

REASONABLE MANAGEMENT.

See HIGHWAYS, 13.

REASONABLE PRUDENCE.

See DAMAGES, 3.

REASONABLE TIME.

See INTEREST, 2.

REASONABLE USE.

See EQUITY JURISPRUDENCE, 14, 15: HIGHWAYS, 9-13.

REASONS.

See FINDING OF FACTS, 2: PRACTICE IN SUPREME COURT, 12.

REBUTTAL.

See EVIDENCE, 37, 44.

RECITALS.

See DEEDS, 3: LETTERS OF GUARDIANSHIP, 2.

RECIPROCAL PAYMENTS.

See CONTRACTS, 3.

RECOGNITION.

See MORTGAGES, 2.

RECOLLECTION.

See EVIDENCE, 28, 29.

RECONSIDERATION.

See REMOVAL OF COUNTY SEAT.

RECONSTRUCTION.

See REPAIRS.

RECORD.

See EVIDENCE, 26: HIGHWAYS, 2, 14: PRACTICE IN SUPREME COURT, 14, 18: STIPULATIONS.

RECORD EVIDENCE.

See EVIDENCE, 9.

RECOUNPMENT.

See QUANTUM VALEBAT, 5, 6.

REDEMPTION.

See FORECLOSURES, 11.

REFEREES.

1. The finding of facts in a referee's report is not open to review upon exceptions where the proceeding is not so shaped as to raise the question whether any specific finding is unsupported by any evidence.—*Mason v. Fractional School District, etc.*, 228.
2. Where it is claimed there has been any improper omission in the report of a referee, the remedy is to procure a further finding, and not to seek to raise the question by exception to the report.—*Ibid.*

REFERENCE TO OTHER STATUTES.

See LEGISLATION, 2.

REFUSING DISCHARGE.

See MORTGAGES, 4.

REGISTER.

See GARNISHMENT.

REGISTRY.

See CHATTEL MORTGAGES, 2, 3: DEEDS, 1, 2: EVIDENCE, 12-15: MORTGAGES, 5, 6.

REGULARITY.

See LETTERS OF GUARDIANSHIP, 2.

RELATIVE RIGHTS.

See EQUITY JURISPRUDENCE, 16.

RELATOR.

See EQUITY PLEADING AND PRACTICE, 14.

RELEASE.

By wife: See CONTRACTS, 15, 16.

Obtained to cure defects: See FORECLOSURES, 7, 8.

See CONTRACTS, 13: ESTOPPEL, 3: PRINCIPAL AND SURETY: PROMISSORY NOTES, 7.

REMEDY.

See JUSTICE'S COURTS, 2: MANDAMUS, 1: SCHOOL DISTRICTS, 1.

REMEDY AT LAW.

See EQUITY JURISPRUDENCE, 1-3, 9.

REMOVAL OF COUNTY SEAT.

The action of the board of supervisors in canvassing and declaring the result of a popular vote, upon a proposition for the removal of the county-seat, being final, any subsequent action by them, reconsidering and reversing their previous canvass and declaration, is without force.—*Attorney General v. Supervisors of Benzie County*, 211.

REMOVAL OF TREES.

See HIGHWAYS, 5-8.

RENTS.

1. In an action to recover rent the non-joinder of a co-tenant as plaintiff can only be set up in abatement, and where not so

- pleaded it will go merely to apportion the damages.—*Perrin v. Lepper*, 292.
2. An owner of property, or any interest therein, may grant, convey or assign his right or interest without requiring the assent or acquiescence of any third person, and the grantee or assignee will take, hold and enjoy the property so acquired in the same manner and with the like rights that his grantor or assignor had.—*Ibid*.
 3. The lessor of real estate may convey his reversion and his grantor will be entitled to the rents accruing thereafter, or he may assign the reversion, reserving the rents, or assign the rents due and to become due, and in either case when the rents are assigned, the assignee may sue and collect them in his own name under our statutes.—*Ibid*.
 4. A conveyance of leased lands with the reversion, remainder, "rents, issues and profits thereof," transfers to the grantee the right to collect and sue for the rent thereafter accruing, and the tenant cannot defeat his action by refusing to attorn to him.—*Ibid*.
 5. The doctrine of attornment grew out of the peculiar relations existing between the landlord and his tenant under the feudal law, and the reasons for the rule never had any existence in this country, and it is inconsistent with our laws, customs and institutions; beyond its application to estop a tenant from denying the title of his landlord it can serve but little if any useful purpose.—*Ibid*.
 6. A tenant in common of lands is not liable to his co-tenants for use and occupation by him of their common estate, in the absence of any agreement or understanding that he was to pay for the same.—*Wilmarth v. Palmer*, 347.
 7. And the suggestion that his holding was adverse would not better the matter, since that would destroy the relation of landlord and tenant entirely, and would be equally fatal as an objection to recovering rent.—*Ibid*.

REPAIRS.

Under an ordinance requiring a street railway company to "keep the surface of the street inside the rails and for two feet four inches outside thereof in good order and repair, provided, however, that upon the paved portion of said streets the materials for repaving shall be supplied at the expense of the city," where the city directs the company to "raise and repair" that portion of the pavement which is within the rails, at a time when it had become so worn and dilapidated that a reconstruction with new materials was essential, the city is bound to bear the expense of the materials; such

repairs amount to repaving within the meaning of the proviso.—*Fort Wayne & Elmwood R. W. Co. v. Detroit*, 78.
See RAILROADS, 4, 5.

REPAVING.

See REPAIRS.

REPETITIONS.

See CHARGE TO THE JURY, 2.

REPLEVIN.

1. Whether where there is a variance in the description of the property as contained in the writ of replevin and declaration, and that specified in the certificate of appraisal, the plaintiff is under the necessity of showing that the property taken on the writ was the same as that described in the writ and declaration.—*Quære?*—*Burrows v. Bailey*, 64.
2. The sureties on a replevin bond are not discharged by the transfer of the replevin suit from the Wayne circuit to the superior court of Detroit by virtue of the statute.—*Reusch v. Demass*, 95.
3. In an action of replevin against a constable to recover property he had seized upon an attachment against a third person, the exclusion of a defense based upon contract rights to the property in the plaintiff in attachment, is held not error where no such rights were set up when the demand was made before the replevin suit was brought, and it does not fairly appear that the officer was instructed to hold on the footing of such rights, and where the contract set up gave the right of possession to another.—*Town v. Tabor*, 262.
4. It is not for a defendant in replevin to object that the plaintiff acquired title from a third person through an abuse of confidential relations, so long as the person said to be thus defrauded is satisfied and makes no complaint.—*Ibid.*
5. There is no law in this state to prevent an attorney from buying a chattel of one person and then suing another in replevin to obtain possession of it.—*Ibid.*
6. Under the statute (*Comp. L.*, § 6754) requiring judgment in replevin to be according to the respective rights and interests of the parties in the property, the exact extent of the subsisting claim of a mortgagee who brings replevin is a legitimate subject of inquiry.—*Kohl v. Lynn*, 360.
7. In replevin where the verdict is for defendant and he claims only a lien upon or special interest in the property, the general title being in the plaintiff, it is essential under our

statute that the verdict should specify the amount of defendant's interest.—*Farmers' Loan and Trust Co. v. St. Clair*, 518.
See SPECIAL QUESTIONS TO JURY, 4.

REPLEVIN BOND.

See JUSTICE'S COURTS, 1, 2.

REPORT.

See REFEREES, 1, 2.

REPRESENTATIONS.

See CONTRACTS, 4, 5.

REPUTATION.

See PRACTICE IN SUPREME COURT, 13.

REQUESTS TO CHARGE.

See PRACTICE IN SUPREME COURT, 14.

RES ADJUDICATA.

See INDIAN TREATY, 3: REMOVAL OF COUNTY SEAT.

RESALE.

See CONTRACTS, 13.

RESCISSION.

See CONTRACTS, 19.

RESERVATION OF POSSESSION.

See DEEDS, 4.

RESIDUARY LEGATEES.

See ESTATES OF DECEASED PERSONS, 3-6.

RES INTER ALIOS.

See REPLEVIN, 4.

RESISTANCE.

See RAPE.

RESTRICTIONS.

See HIGHWAYS, 9: MILL-DAMS, 2.

RETURN.

See ATTACHMENT, 2-4, 7, 8: CRIMINAL EXAMINATIONS, 6:
EXECUTION SALES, 3.

RETURN DAY.

See JUSTICE'S COURTS, 3.

RETURN OF PROPERTY.

See JUSTICE'S COURTS, 1.

RETURNS BY TAX COLLECTORS.

See COUNTY TREASURERS, 2, 3.

REVIEW.

See FINDING OF FACTS, 1, 2: WRIT OF ERROR, 1, 2.

RIGHTFUL POSSESSION.

See TRESPASS, 4.

RIGHT OF ENTRY.

See RIGHT OF POSSESSION, 2.

RIGHT OF FLOWAGE.

See EQUITY JURISPRUDENCE, 10: MILL-DAMS, 1-3.

RIGHT OF POSSESSION.

1. The constructive possession of vacant lands, as between mortgagor and mortgagee, must be deemed to be in the mortgagor.—*Albright v. Cobb*, 316.
2. The mortgagee of a mortgage given in 1839, in this state, had a right to take possession by way of security; but this was a mere right of entry and would be barred after twenty years.—*Ibid.*

RIGHT TO REDEEM.

See FORECLOSURES, 11, 13.

RIPARIAN OWNERS.

The public has no proprietorship in the soil under small streams which are navigable only in a modified sense for floatage of

logs and lumber, as it has under navigable waters at the common law, where the tide ebbs and flows; but the riparian owner presumably owns to the center of the stream.—*Attorney General v. Ewart Booming Co.*, 462.

RISK OF LOSS.

See PAYMENT, 1-3.

RIVERS.

See EMINENT DOMAIN, 1-4.

ROADS.

See HIGHWAYS: RAILROADS.

RULES CONSTRUED.

	PAGE.
Circuit Court Rule 79	113
Circuit Court Rule 85	279, 317
Circuit Court Rule 99	29
Supreme Court Rule 12	235, 490
Supreme Court Rule 16	235
Supreme Court Rule 21	235

See SUPERIOR COURT OF DETROIT, 1-4.

RULES OF DESCENT.

See DESCENT OF PROPERTY, 1-4.

RULES OF PRACTICE.

See SUPERIOR COURT OF DETROIT, 1-4.

RULINGS THAT DO NOT PREJUDICE.

See EVIDENCE, 42: PRACTICE IN SUPREME COURT, 5: TRESPASS, 2.

SAGINAW CITY.

See DIRECTORS OF THE POOR.

SALES.

By mortgagee: See CHATTEL MORTGAGES, 4.

By United States: See SWAMP LANDS, 1-3.

Of lands: See INDIAN TREATY, 2.

See CHATTEL MORTGAGES, 9: EQUITY JURISPRUDENCE, 6, 7, 16: EQUITY PLEADING AND PRACTICE, 15: EVIDENCE, 14, 15: EXECUTION SALES, 1-3: FORECLOSURES, 13: QUANTUM VALEBAT, 6.

SCALER.

See CONTRACTS, 17.

SCHOOL DISTRICTS.

1. An action for money had and received will lie in favor of a school district to recover district moneys received by its assessor and which after expiration of his office he refuses on demand to pay over to his successor, and an action upon the assessor's bond is not the exclusive remedy; the bond is required as additional security, but it does not supersede the officer's individual responsibility.—*Mason v. Fractional School District, etc.*, 228.
2. An assessor cannot lawfully withhold the district funds in his hands when the same are properly demanded by his successor a fortnight after the latter has been regularly elected and has accepted and qualified, upon any claim that he is entitled to be first personally notified officially of such election and acceptance; he is chargeable with notice of these facts without any personal certification thereof.—*Ibid.*
3. An official treasurer cannot defend an action to make him turn over to his successor the funds in his official custody, upon any questions of the regularity of the proceedings whereby the funds came into his possession.—*Ibid.*
4. The statute (*Comp. L.*, § 1025) expressly requiring the township treasurer to pay the amount of taxes raised for school purposes to the order of the school district officers, his liability therefor is distinct from his ordinary liability for township moneys, and cannot be released or in any way affected by the action of the town board.—*Jones v. Wright*, 371.
5. A township treasurer has no right to receive for school moneys anything which the law has not authorized to be so received, and if he chooses to do so and to receipt for the taxes, he must make good the amount.—*Ibid.*

SCHOOL MONEYS.

See SCHOOL DISTRICTS, 4, 5.

SEAL.

See BAIL BONDS, 3: DEEDS, 1, 2.

SEARCH.

See INSURANCE, 6.

SEARCH WARRANT.

1. An officer in executing a search warrant fair on its face, and

issued by a court having jurisdiction over the subject matter, is not liable for his official acts in following in good faith the command of his writ and the official directions of the court, though it should be made clearly to appear that the property seized had not in fact been stolen, and that the party suing out the writ was not entitled to its possession.—*Dunn v. Gilman*, 256.

2. An officer who is made liable by statute to a penalty if he refuses to execute a writ, cannot be held liable for serving the writ in good faith where the process is valid on its face and issued by the proper authority.—*Ibid*.
3. The property, during the time it is in the officer's possession under and by virtue of a valid search warrant, is to be considered as in the custody of the law, although the proceeding based on such writ touching the question of ownership be not conclusive; and an owner claiming that his rights have been interfered with by such proceedings must seek his remedy against some other person than such officer.—*Ibid*.

SECRET ARRANGEMENT.

See CONTRACTS, 7.

SECRET CONVEYANCE.

See EQUITY JURISPRUDENCE, 12.

SECURED BY MORTGAGE.

See EVIDENCE, 7: PROMISSORY NOTES, 1.

SECURITIES.

See CHATTEL MORTGAGES, 4: CONTRACTS, 5: FORECLOSURES, 9, 10.

SELECTION.

See INDIAN TREATY, 1.

SELF-KILLING.

See INSURANCE, 7-12.

SEPARATE FIELDS.

See EXECUTION SALES, 2.

SERVICE.

Of assignment of errors: See PRACTICE IN SUPREME COURT, 9.

Of notice: See HIGHWAYS, 2.

Of process: See ATTACHMENT, 1-5.

SERVICES.

See CONSIDERATION: EVIDENCE, 20: IMPLIED PROMISE: LOG-LIEN LAW, 2, 3.

SETTLEMENTS.

1. Where two parties have mutually arranged that one should deliver certain notes and ship certain property, paying the freight, to a third person, who should deliver the same to the other and take his receipt in full of all demands against the first, and afterwards deliver such receipt to him on his giving a like receipt back for the other party, the party who has delivered over the notes, shipped the property and paid the freight in full compliance with the agreement on his part, cannot be held responsible because the third person mutually agreed upon afterwards of his own motion refused to turn the same over except upon compliance with a further demand which the agreement did not authorize him to make.—*Crippen v. Hope*, 55.
2. Both parties are equally responsible for the unauthorized acts of a third person whom they have mutually chosen to act between them, and where one of them has done all that by the agreement he was to do, he is not to be held liable to the other for the failure of their mutual agent to do his part.—*Ibid*.

See GUARDIAN AND WARD: PAYMENT, 2.

SEVERANCE.

See EJECTMENT, 3.

SHADE TREES.

See HIGHWAYS, 5-8.

SHERIFF.

See BAIL BONDS, 1-8: DAMAGES, 5.

SHIPPER.

See DAMAGES, 2-4.

SIGNATURE.

See PRACTICE IN CIRCUIT COURTS, 2.

SIGNING WITHOUT READING.

See CONTRACTS, 9.

SIMULTANEOUS MORTGAGES.

See EQUITY JURISPRUDENCE, 16: EQUITY PLEADING AND PRACTICE, 15: MORTGAGES, 6.

SOIL UNDER STREAMS.

See NUISANCES, 3-5: RIPARIAN OWNERS.

SOLVENCY OF MAKER.

See PROMISSORY NOTES, 9-11.

SPECIAL BAIL.

See BAIL BONDS, 7.

SPECIAL DEFENSE.

See INSURANCE, 13.

SPECIAL EXCEPTIONS.

See PRACTICE IN SUPREME COURT, 11.

SPECIAL FINDINGS.

See INSURANCE, 12: SPECIAL QUESTIONS TO JURY, 1-4.

SPECIAL INTEREST.

See DAMAGES, 5: REPLEVIN, 7.

SPECIAL PROCEEDINGS.

See LOG-LIEN LAW, 1-3: WRIT OF ERROR, 1, 2.

SPECIAL PROPERTY.

See REPLEVIN, 6.

SPECIAL QUESTIONS TO JURY.

1. It is only competent under the statute (*Comp. L. § 6026*), to render judgment upon special findings of fact, and against the general verdict, upon the ground that they are inconsistent, where it is impossible, though all presumptions be made in favor of harmony, to reconcile the special findings with the general one.—*Foster v. Gaffield*, 356.
2. Special questions to the jury and their answers thereto are to be applied by the record only, and not by explanations outside the record; and such a question and finding, which regarded in the light of the record is meaningless or irrelevant, ought not to control a general verdict.—*Ibid*.

3. Where two special findings are inconsistent with each other, and only one of them is inconsistent with the general verdict, they neutralize each other and leave the general verdict to stand.—*Ibid.*
4. Where in an action of replevin the jury, in response to one special question, have answered that the property was not detained or held by defendant when the suit was brought, and to another, that he was connected with the detention or possession thereof, it is to be presumed their meaning was, that though defendant did not personally hold or detain the property, he was a party in some way to the detention; and so construed, these special findings are not inconsistent with a general verdict for plaintiff.—*Ibid.*

See INSURANCE, 12.

SPECIFIC OFFENSE.

See CRIMINAL EXAMINATIONS, 2-6.

SPECIFIC PERFORMANCE.

See CONTRACTS, 20: EQUITY JURISPRUDENCE, 8, 9: EQUITY PLEADING AND PRACTICE, 7-8.

SPECIFIC TAX.

See TAXATION, 6.

SPECULATION.

See DAMAGES, 4.

STATE AGENTS.

See DETROIT HOUSE OF CORRECTION, 2.

STATE AND TERRITORIAL ROADS.

See HIGHWAYS, 4.

STATE INTEREST.

See EQUITY JURISPRUDENCE, 13, 15.

STATEMENTS.

See AGENCY, 3: APPLICATION OF PAYMENTS, 1-3: EVIDENCE, 31, 33: FALSE IMPRISONMENT, 1-3: RAPE.

STATE POLICY.

See SUPERIOR COURT OF DETROIT, 2.

54 MICH.—81.

STATUTE OF FRAUDS.

See CHARGE TO THE JURY, 4: CONTRACTS, 12, 13, 16, 18-20:
ESTOPPEL, 2-6: MORTGAGES, 3.

STATUTE OF LIMITATIONS.

See RIGHT OF POSSESSION, 2.

STATUTES CONSTRUED OR COMMENTED UPON.

ACTS OF CONGRESS:

	PAGE
U. S. Stat. at Large, Vol. 10, p. 634: Swamp lands, . . .	413
U. S. Stat. at Large, Vol. 11, p. 251: Swamp lands, . . .	415
U. S. Stat. at Large, Vol. 11, p. 633: Indian Treaty, . . .	147
U. S. Stat. at Large, Vol. 14, p. 3: Indian Treaty, . . .	144
U. S. Rev. Stat., p. 168, § 891: Transcript of record of land patent, ...	349
U. S. Rev. Stat., p. 454, §§ 2469-70: Transcript of record of land patent, ...	349

SESSION LAWS:

Laws of 1840, p. 166, § 2: Deeds: certificate of due ex- ecution, ...	151
Laws of 1851, p. 322: Swamp lands, ...	409
Laws of 1853, p. 116: Swamp lands, ...	411
Laws of 1853, p. 182, § 10: Water rates in Detroit, . . .	274
Laws of 1861, p. 167: Swamp lands, ...	415
Laws of 1861, p. 262: Detroit House of Correction, . . .	404
Laws of 1869, p. 1678: Assessments on vacant lots by water commissioners of Detroit, ...	275
Laws of 1871, p. 176: Corporate existence, ...	280
Laws of 1872, Vol. 1, p. 89: Assessment of taxes: appeal to Circuit Court, ...	59
Laws of 1873, p. 61: Superior Court of Detroit, ...	434
Laws of 1873, p. 466: Log-lien law, ...	321
Laws of 1873, p. 483: Dogs going at large, ...	283-4
Laws of 1873, p. 486: Condemning lands for mill pur- poses, ...	299
Laws of 1875, p. 6: Superior Court of Detroit, ...	436

COMPILED LAWS OF 1871:

§ 485: Removal of county seat, ...	211
§ 491: Supervisors: highways, ...	48
§ 554: Under sheriff, ...	271
§ 1025: School district funds, ...	372
§ 1034: Return of delinquent tax lists, ...	481
§§ 1130-1: Tax liens, ...	517
§ 1253: Laying out highways: notice, ...	38, 359

	PAGE.
§ 1268: Highways: curative act, ...	513
§ 1317: Highway commissioners: removal of shade trees, ...	87
§§ 1801-15: Support of poor by relatives, ...	58
§§ 1816-70: Support of poor by the public, ...	54
§ 2315: Proceedings to condemn lands for railroads, ...	17
§ 2440: Fencing railroads, ...	323
§§ 2716-44: Improvement of rivers, ...	205, 209
§ 2841: Corporations: increase of capital stock, ...	91
§ 4231: Registry: unrecorded deed: bona fide purchaser, ...	69
§ 4246: Penalty for refusing to discharge mortgage, ...	312-3
§ 4309: Descent of property, ...	453
§§ 4341-3: Probate of will: foreign probate, ...	152
§§ 4364-7: Residuary legatee's bond, ...	241
§ 4401: Residuary legatee: inventory, ...	242
§§ 4481-94: Executors and administrators, ...	242
§ 4621: Guardian's sale: disabilities: limitation, ...	187
§ 4626: Proceedings to mortgage lands of wards, ...	15
§ 4692: Statute of frauds: interests in lands, ...	325, 342, 387, 499
§ 4706: Registry of chattel mortgages: subsequent purchaser, etc., ...	361
§ 4724: Marriage between white person and negro, ...	340
§ 5072: Bills to quiet title, ...	417
§ 5150: Mortgages secured by obligation of third person, ...	13
§ 5433: Appeal bonds; justice's court, ...	40
§ 5477: Certiorari to justice of the peace: judgment, ...	247
§§ 5489-90: Justice's judgment; how proved, ...	85
§§ 5723-4: Suits commenced by declaration; time to plead, ...	431-3
§ 5738: Bail bonds: under sheriff, ...	271
§ 5739: Bail pieces, ...	271
§ 5754: Assignment of bail bond, ...	271
§ 6026: Special questions to jury, ...	44, 357
§ 6106: Sales of personalty on execution, ...	438
§ 6193: Declaration: venue, ...	516
§ 6238: Statutory new trial in ejectment, ...	63
§ 6398: Affidavit for attachment, ...	520
§ 6403: Appraisal: disinterested freeholders, ...	521
§ 6409: Attachment: possession: growing crop, ...	521
§ 6503, Sub. 3: Garnishment: public officer, ...	101
§ 6547: Corporate existence, ...	280
§ 6630: Judgment against townships: how collected, ...	28
§ 6735: Replevin bond in justice's court, ...	40
§ 6738: Replevin: goods not found, ...	356
§ 6754: Replevin: special property or lien, ...	362, 518
§ 7590: Fraudulent procurement of signature, ...	81
§ 7680: Penalty for refusing to execute process, ...	258

	PAGE.
§ 7694: Bigamy, ...	340
§§ 7844-60: Criminal examinations, ...	288-9
§ 7868: Power to admit to bail, ...	290
§ 7875: Bail: examining magistrate, ...	291
§ 7926 Amendment of information, ...	82
§ 8003: Search warrant: custody of the law, ...	258
§§ 8145-64: Detroit House of Correction, ...	404

STATUTORY NEW TRIAL.

See EJECTMENT, 1, 2.

STATUTORY PENALTY.

See MORTGAGES, 4.

STEAMBOAT CLERK.

See EVIDENCE, 33.

STEAM LOCOMOTIVES.

See HIGHWAYS, 10-13.

STIPULATIONS.

A case will not be considered in a court of review in the light of a stipulation of facts alone, where by the record it appears that on the trial a further showing was made.—*Edwards v. Taliafero*, 13.

STOCK.

See CORPORATIONS, 1-4.

STOCKHOLDERS.

See CORPORATIONS, 3, 4.

STOCK OF GOODS.

See CHATTEL MORTGAGES, 5-10.

STREAMS.

See EMINENT DOMAIN, 1-4: NUISANCES, 1-5: RIPARIAN OWNERS.

STREET RAILWAY.

See REPAIRS.

SUBMISSION.

See AWARDS, 3.

SUBSEQUENT MORTGAGEE.

See CHATTEL MORTGAGES, 2, 3: EQUITY PLEADING AND PRACTICE, 10-12: FORECLOSURES, 11-13.

SUBSEQUENT NEGOTIATIONS.

See GOODS SOLD AND DELIVERED, 2.

SUBSEQUENT PURCHASER.

See CHATTEL MORTGAGES, 1-3: DESCRIPTION OF PROPERTY, 1: EVIDENCE, 12-15: FORECLOSURES, 5-8: MORTGAGES, 2, 3.

SUBSEQUENT TAX TITLE.

See TAX-LIENS.

SUBSTANCE.

See EVIDENCE, 41.

SUBSTANTIAL ALLEGATIONS.

See PLEA, 3.

SUCCESSOR.

See FORECLOSURES, 13.

SUFFICIENCY OF ASSETS.

See ESTATES OF DECEASED PERSONS, 6.

SUICIDE.

See INSURANCE, 7-12.

SUIT PENDING.

See PLEA, 1.

SUMMARY PROCEEDINGS.

See WRIT OF ERROR, 1, 2.

SUPERIOR COURT OF DETROIT.

1. The superior court of Detroit has no authority under the statute to provide by rule not approved by the supreme

court for defaulting a defendant sued by declaration within ten days after service.—*Wyandotte Rolling Mills Co. v. Robinson*, 428.

2. It has been the clear policy of the state for many years, evidenced by constitutional provision and by legislation, to secure uniformity in all the tribunals of the same class as to substantial matters of practice; and the superior court of Detroit, as respects civil jurisdiction, is a tribunal of the same class as the circuit courts.—*Ibid*.
 3. The commencement of suits by declaration being a statutory innovation, so that no established common-law practice exists to govern, the fixing of a reasonable time within which to plead after service is within the scope of the general practice of the circuit courts; and it should be fixed either by statute or by court rule; but the legislature having by statute fixed the period at twenty days for the circuit courts generally, it is not within the power of a court of like jurisdiction subsequently created to shorten this period to ten days, in the absence of statutory provision clearly conferring such authority.—*Ibid*.
 4. The authority given to the superior court, by its original organic act (*Laws 1873, p. 61*), to make and adopt rules of practice for such court in respect to times for pleading, etc., does not empower that court to interfere with the legislative regulation concerning actions commenced by declaration, and under the amendment of 1875 (*Laws 1875, p. 6*), the power of the superior court to adopt any general rule of practice is made subject to the condition of approval thereof by the supreme court.—*Ibid*.
- See REPLEVIN, 2.

SUPERIOR PRIVILEGE.

See HIGHWAYS, 10-12.

SUPERVISORS.

See EMINENT DOMAIN, 4, 6; HIGHWAYS, 4: REMOVAL OF COUNTY SEAT: TAXATION, 1, 2.

SUPPORT OF POOR BY RELATIVES.

See WRIT OF ERROR, 1.

SURETIES.

See BAIL BONDS, 1-3: DECLARATION, 1, 2: PRINCIPAL AND SURETY: REPLEVIN, 2.

SURGICAL OPERATION.

See DIRECTORS OF THE POOR.

SURRENDER.

See INSURANCE, 1.

SURROUNDING FACTS.

See DESCRIPTION OF PROPERTY, 1, 2.

SWAMP LANDS.

1. Under the act of congress of September 28, 1850, granting to the state of Michigan certain lands known as "swamp lands," and the subsequent acts of March 2, 1855, and March 3, 1857, and the statutes of Michigan of June 28, 1851, of February 14, 1853, and March 11, 1861, it is held that the rights of one who had purchased of the United States authorities in 1852, and gone into possession of a parcel of land embraced in the scheme of the original act of 1850, were paramount to those of the state under said grant, or of its assigns.—*Dale v. Turner*, 405.
2. The intent is plain from this legislation, both on the part of the United States and of the state, to make this donation to the state, as contemplated in the original grant, subject to all intervening rights of parties who had, before the complete vesting of the title in the state, purchased from the United States.—*Ibid.*
3. Whether or not the original act was sufficient of itself to work an immediate transfer of title to the class of lands to which it applied, it was clearly within the power of the contracting parties, the state and the United States, to agree, in the absence of any conflicting right, that sales made by the latter subsequent to such act should be respected by the state and be left to be completed by the United States by conveyance, and that the state should resort to the United States for equivalents; and their action clearly indicates that they did make such agreement.—*Ibid.*
See EQUITY JURISPRUDENCE, 11.

TAKING BOND OF INDEMNITY.

See MORTGAGES, 9.

TAXATION.

1. Taxes and loans, when authorized to be raised by any public body, must be raised under the implied condition that they

- are to be applied to the public uses under the control or care of that body. They cannot be raised for the purposes or uses of others, unless such a power is plainly given, and such a power cannot be given for all purposes.—*Attorney General v. Supervisors of Bay County*, 46.
2. A resolution of a board of supervisors providing for raising money to be paid over to the towns without any definition of purposes, and to be spent under the direction of a town officer, is held to be unauthorized and void.—*Ibid*.
 3. A statute providing for raising money by tax to reimburse a township treasurer for a sum paid by him to the township to make good an amount of the public money of which he had been robbed, is held unconstitutional and void.—*Bristol v. Johnson*, 123.
 4. Water rates paid by consumers, under the statute incorporating the water commissioners of Detroit, are in no sense taxes, and the lien, though enforced in the same way as a lien for taxes, by sale of the premises, is really a lien for an indebtedness, like that enforced on mechanics' contracts, or against ships and vessels; they are but the price paid for water as a commodity, and the use of the water is not compulsory.—*Jones v. Water Commissioners of Detroit*, 273.
 5. The taxes provided for by the act of 1869, against vacant lots in front of which water pipes are laid, not being devoted by the statute to any specific purpose, must go, if valid, into the general fund; and not being applied by the statute to expenses or constructions on the street, or in any district within which they are raised, nor proportioned in any way to the cost of the improvement, they cannot come within the class of local assessments.—*Ibid*.
 6. The purposes of this assessment being general, it is to be regarded as a tax in the most general sense, and subject to the rules of law governing taxes. It is not in any sense a specific tax.—*Ibid*.
 7. The constitutional requirement of uniformity in taxation, according to the cash value of the property, applies to such assessments; and an assessment upon a specified class of lots only, laid upon their frontage on the street, is beyond the power of the legislature to authorize.—*Ibid*.
- See COUNTY TREASURERS, 1-3: TAX TITLES: WRIT OF ERROR, 2.

TAXES.

See EQUITY JURISPRUDENCE, 1-4: HIGHWAYS, 4: SCHOOL DISTRICTS, 5.

TAX LEASE.

See TAX TITLES.

TAX LIENS.

The statute (*Comp. L. 1871, § 1131*) authorizing a recovery for the amount paid by the plaintiff for tax-titles which for certain specified reasons are not valid, and making the same a lien upon the land, does not warrant a judgment declaring the amount so paid by plaintiff a paramount lien to that of a subsequent tax-title held by another upon the same land, which, though invalid as a title, is within the protection of the statute as a lien on the land.—*Robbins v. Barron, 517.*

TAX PAYERS.

See EQUITY PLEADING AND PRACTICE, 4.

TAX TITLES.

A city tax-lease, given on a sale for delinquent taxes, is invalidated by a showing that an excess of over twelve thousand dollars was assessed and spread upon the roll of the city for that year, and that a portion of the same entered into the amount of taxes for which the property in question sold.—*Edwards v. Taliafero, 13.*

See TRESPASS, 3.

TECHNICAL DEFECTS.

See PLEA, 3.

TECHNICAL IMPERFECTIONS.

See CERTIORARI.

TENANCY.

See EJECTMENT, 5.

TENANTS.

In common: See RAILROADS, 1-3: RENTS, 6, 7.

See RENTS, 1-5.

TEN-DAY RULE.

See SUPERIOR COURT OF DETROIT, 1-4.

TESTAMENTARY GIFTS.

See CONTRACTS, 21.

34 MICH.—82

TESTATOR'S CIRCUMSTANCES.

See WILLS, 3-5.

TESTIFYING FROM MEMORANDUM.

See EVIDENCE, 28, 29.

TESTIMONY OF SINGLE WITNESS.

See CHARGE TO THE JURY, 3.

THREATENED SALE.

See VOLUNTARY PAYMENT, 1.

THREAT TO ENFORCE PAYMENT.

See VOLUNTARY PAYMENT, 4.

TIME.

To appear and plead: See SUPERIOR COURT OF DETROIT, 1-4.

See AWARDS, 2: CONTRACTS, 1: COUNTY TREASURERS, 1-3:
EJECTMENT, 1, 2, 4.

TITLE.

See ESTOPPEL, 2-6: EVIDENCE, 8, 40-44.

TOWNSHIP PURPOSES.

See TAXATION, 2.

TOWNSHIPS.

See MANDAMUS, 1.

TOWN TREASURERS.

See SCHOOL DISTRICTS, 4, 5: TAXATION, 3.

TRANSCRIPTS.

See EVIDENCE, 17, 26.

TRANSFER.

Of causes: See REPLEVIN, 2.

Of personal property: See CONTRACTS, 21.

Of title: See ESTOPPEL, 2-6: PARTNERSHIP, 2: SWAMP LANDS, 3.

Subject to a trust: See CHATTEL MORTGAGES, 7.

TRANSPORTATION CONTRACTS.

See DAMAGES, 2-4.

TREASURERS.

See COUNTY TREASURERS, 1-3.

TREES.

See HIGHWAYS, 5-8.

TRESPASS.

1. Where a declaration in trespass is not for a continuing trespass begun at one time and continued up to another, but for a series of distinct acts of trespass, the first being laid on or about a specified day and the others at divers other times, it is competent for the court to put the plaintiff to his election by confining him to proof of either a single act prior to the date specified, or of so many as the truth allowed between that date and the commencement of suit.—*McDiarmid v. Caruthers*, 49.
 2. Where under a declaration in trespass charging a series of distinct acts of which the first is laid on or about a specified day, the court at the outset has ruled that plaintiff must elect between a single act prior to the date specified, and so many as his proofs would warrant afterwards, and he has accordingly elected the latter, and offered no proof of the former, and it in no wise appears that he was in a situation to offer any, the ruling, if abstractly incorrect, is not shown to be prejudicial.—*Ibid.*
 3. In an action of trespass to lands, where the plaintiff is not in actual possession, but bases his right upon the legal title and the constructive possession claimed to be drawn therefrom, evidence of tax titles held by third persons is admissible, such titles being *prima facie* paramount, and therefore, unless overcome, defeating plaintiff's right of action.—*Tolles v. Duncombe*, 101.
 4. Trespass to lands will not lie against one rightly in possession, where the complaint is not of the retention of the land, but of the particular use to which it is put, which, however, is not out of the ordinary course of farming.—*Burnham v. Van Gilder*, 246.
- See HIGHWAYS, 5-8.

TRESPASS ON THE CASE.

See ACTION ON THE CASE.

TROVER.

See DAMAGES, 5.

TRUSTS IN PERSONAL PROPERTY.

See CHATTEL MORTGAGES, 6, 7.

UNCERTAINTY.

See PROMISSORY NOTES, 9.

UNCONSTITUTIONAL STATUTE.

See VOLUNTARY PAYMENT, 3.

UNDER-SHERIFF.

See BAIL BONDS, 1, 4.

UNDIVIDED INTERESTS.

See EJECTMENT, 3: RAILROADS, 1-3.

UNIFORMITY.

See SUPERIOR COURT OF DETROIT, 2: TAXATION, 7.

UNLAWFUL CONVERSION.

See CAPIAS AD RESPONDENDUM.

UNLIQUIDATED DEMANDS.

See MANDAMUS, 2.

UNPERFORMED CONTRACT.

See DAMAGES, 1: MANDAMUS, 2: QUANTUM VALEBAT.

UNREASONABLE DELAY.

See RAILROADS, 4, 5.

UNREASONABLE EXPENSE.

See DAMAGES, 3, 4.

UNSIGHTLY OBJECTS.

See HIGHWAYS, 11.

UNITED STATES BONDS.

See EVIDENCE, 36.

UNITED STATES LAND PATENT.

See EVIDENCE, 26.

USE.

See MILL-DAMS, 1-3.

USE AND OCCUPATION.

See RENTS, 6, 7.

USE OF WATER.

See MILL-DAMS, 1-3: TAXATION, 4.

USUAL MANNER OF RUNNING TRAINS.

See NEGLIGENCE, 1.

VACANT LANDS.

See RIGHT OF POSSESSION, 1, 2.

VALUE.

See DOGS, 2: PROMISSORY NOTES, 10: QUANTUM VALEBAT, 3-6.

VARIANCE.

See EQUITY PLEADING AND PRACTICE, 13: EVIDENCE, 7: INFORMATIONS: PROMISSORY NOTES, 1: REPLEVIN, 1.

VENDOR'S LIEN.

See EQUITY JURISPRUDENCE, 6, 7.

VENEREAL DISEASE.

See DIVORCE.

VENUE.

See DECLARATION, 6.

VERBAL STIPULATIONS.

See CONTRACTS, 10.

VERDICT.

See INSURANCE, 12: REPLEVIN, 7: SPECIAL QUESTIONS TO JURY, 1-4.

VOID SECOND MARRIAGE.

See BIGAMY, 1, 2.

VOID TAX.

See VOLUNTARY PAYMENT, 2-4.

VOLUNTARY PAYMENT.

1. Where sale of one's land is threatened upon an assessment against him, the test whether he may safely pay under protest to prevent the sale, and afterwards sue to recover back the money so paid, seems to be whether the sale if made would constitute a cloud upon the title.—*Detroit v. Martin*, 170.
2. A cloud upon title to lands is something which constitutes an apparent defect or incumbrance, something that *prima facie* shows some right of another either to the whole or some interest in it; and a sale to satisfy an alleged tax which has no semblance of legality, but is totally void on its face, would not cast a cloud upon the title.—*Ibid.*
3. One who has full knowledge of all the facts, being conclusively presumed to know the law, is presumed to know that an assessment laid under a statute which is unconstitutional and void cannot be made the basis of a sale that could constitute any cloud upon his title, and therefore to know that he could not be injured by it.—*Ibid.*
4. A threat to enforce payment of such a tax, no seizure of goods or of the person having been made, or threatened, or authorized, where the officer has no authority to compel payment otherwise than by sale of the land, which could injure no one, would not constitute a payment made in consequence thereof anything but a voluntary payment.—*Ibid.*
5. A protest cannot alone change what would otherwise be in law a voluntary payment into an involuntary one, or change the rights of the parties; and one paying voluntarily under a claim of right cannot afterwards recover back the money, although he protested at the time against his liability.—*Ibid.*

WAITING AN HOUR.

See JUSTICE'S COURTS, 3.

WAIVER.

See APPLICATION OF PAYMENTS, 1: BAIL BONDS, 2, 5: CHATTEL MORTGAGES, 9: DECLARATION, 4: LOG-LIEN LAW, 3: PLEA, 3: PRACTICE IN SUPREME COURT, 9, 10.

WANT OF EVIDENCE.

See PRACTICE IN SUPREME COURT, 14.

WANT OF PARTIES.

See EQUITY PLEADING AND PRACTICE, 1.

WARDS.

See GUARDIAN AND WARD: LETTERS OF GUARDIANSHIP, 1, 2: MORTGAGES, 1.

WARRANT.

See CRIMINAL EXAMINATIONS, 2: SEARCH WARRANT.

WARRANTY.

See PROMISSORY NOTES, 12.

WATER PIPES.

See TAXATION, 5.

WATER POWER.

See EQUITY JURISPRUDENCE, 10: MILL-DAMS, 1-3.

WATER RATES.

See TAXATION, 4.

WEIGHT OF EVIDENCE.

See NEGLIGENCE, 2.

WHEAT CROP.

See LEASE.

WIDOW.

See EJECTMENT, 5: WILLS, 1.

WIFE.

See CONTRACTS, 15, 16: EQUITY JURISPRUDENCE, 12: EVIDENCE, 31: PARTNERSHIP, 1-4.

WILLS.

1. A clause in a will giving to the testator's wife so much of his property, real and personal, as is allowed by law to widows in cases where no will is made, or in lieu of personal property allowed her by law, five hundred dollars to be taken by her in case she so elect in lieu of said personal property, is held not to be ambiguous, and it is construed so as to give effect to the apparent intent manifest in it. The "personal property allowed by law," to which the sum of five hundred dollars is made an alternative, refers to the specific property to the value of four hundred and fifty dollars which by law the widow is allowed to select.—*Kinney v. Kinney*, 250.
2. Where there is no ambiguity on the face of a will, it is not admissible by extrinsic evidence to seek to raise an ambiguity, and thereupon on the strength thereof to limit or qualify the construction of the language actually used so as to give effect to some conjectured probable purpose of the testator which he has failed to express. This would be not putting a construction upon the will made by him, but making a new one of quite a different purport.—*Ibid*.
3. It is not permissible to deduce from the testator's circumstances an intent differing from that which he has plainly expressed in the will.—*Ibid*.
4. While it may perhaps properly be assumed generally that one making a will has a tolerably correct idea of the condition his estate would be left in if he were immediately taken away, it cannot be conclusively assumed that he anticipates his pecuniary circumstances are afterwards to remain unchanged, and makes his gifts in that expectation.—*Ibid*.
5. A will may be, and often is, made when death is not immediately contemplated, and may well make provisions with a view to possible contingencies of change of fortune, and in that view a provision for a small but certain legacy as the alternative to one probably large but possibly worthless, may be a proper dictate of kindness and generosity.—*Ibid*.
6. Judicial tribunals cannot inquire into a testator's hopes and expectations as to what his fortune may turn out to be when his will shall take effect, any further than he has seen fit to express them; where he has clearly expressed a wish consistent with the rules of law, they must give it effect; they are not at liberty to surmise that his real wishes were something different.—*Ibid*.

See EVIDENCE, 2-6: PROBATE COURTS.

WITNESS.

See EVIDENCE, 23.

WRIT OF ERROR.

1. . Proceedings under the statute (*Comp. L. 1871, ch. 49*), to compel a son to support his mother, are summary in character and in no sense after the course of the common law, and cannot be reviewed on writ of error: the order contemplated as a result of such proceedings is not properly a judgment, and the method of enforcing it is by attachment: and the fact that the parties by voluntary arrangement have proceeded to form an issue and to have a jury trial, cannot affect the question of jurisdiction on review.—*Smith v. Superintendents of the Poor of Lapeer County*, 58.
 2. Proceedings under the statute (*S. L. 1872, p. 89*), on an appeal to the circuit court from an assessment of taxes made by the auditor general, are not judicial in the proper sense of that term, and cannot be reviewed on writ of error.—*Auditor General v. Pullman Palace Car Co.*, 59.
- See EJECTMENT, 2.

WRITTEN CONTRACTS.

See CONTRACTS, 9-13.

WRITTEN EVIDENCE.

See EVIDENCE, 11, 12, 16: PRACTICE IN SUPREME COURT, 5.

WRITTEN FINDINGS.

See EJECTMENT, 1.

WRITTEN INSTRUMENTS.

See EVIDENCE, 1.

WRITTEN ORDERS.

See EVIDENCE, 21.

WRONGFUL ACTS OF MUTUAL AGENT.

See SETTLEMENTS, 1, 2.

34 MICH.—83.

14837-125



